United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

Dec. 18

74-2290

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2290

UNITED STATES OF AMERICA,

Appellee,

—against—

EDMUND ROSNER,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S APPENDIX
Volume II—Pages A-651 to A-1318

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2 C H A R L E S D. S H E R M A N, called as
3 a witness by defendant, being first duly sworn,
4 testified as follows:
5 DIRECT EXAMINATION
6 BY MR. DERSHOWITZ:
7 Q Good afternoon, Mr. Sherman. Will you tell
8 us what your present position is?
9 A Inspector in charge for the Drug Enforcement
10 Administration.
11 Q What was your position in January of 1973?
12 A The same.
13 Q Did there come a time when you received a
14 request from the United States Attorney's Office to
15 conduct an investigation in reference to certain allega-
16 tions made by one Richard Lawrence?
17 A Yes, sir.
18 Q Can you tell me who asked you to make that
19 investigation?
20 A I would say probably a combination of Mr.
21 Morvillo and Mr. Seymour.
22 Q Were you told you will be in charge of the
23 investigation?
24 A That is correct, sir.
25 Q Will you tell me what day you were told that

you would be in charge of the investigation?

A Well, the first conversation would have been on January the 3rd and then there were other conversations on through the middle part of the month, up to and including the 10th of January.

Q Would it refresh your recollection to know that your memorandum stated the 2nd of January?

A That's when I first learned of the allegation, yes. But there are other decisions in there which you haven't alluded to yet.

Q Between January 2nd and the meeting on January 10th that you are alluding to did you engage in any investigation?

A Yes, sir.

Q Could you describe the investigation you conducted between January 2nd and January 10th? Just tell us what you did?

A Between those two dates?

Q Yes.

A Strictly interviews of Mr. Lawrence.

Q On January 10th were you in attendance at a meeting regarding this case?

A Yes, sir.

Q Who was at that meeting?

A Mr. Phillips of the special prosecutor's office, I believe Mr. Nadjari was there, if I'm not mistaken Mr. Seymour and possibly Mr. Morvillo.

Q Where was that meeting?

A In the U. S. attorney's office.

Q What instructions were you given at that meeting?

A That I was to investigate the allegations given by Mr. Lawrence.

Q Were you told that your investigation had to be conducted with speed?

A I don't believe there was any specific reference to speed. All investigations should be conducted as timely as possible.

Q Werevou given any deadline?

A No, sir.

Q Did you understand that the investigation had to be concluded within any period of time, any specific period of time?

A As soon as possible.

Q Were you told it was an urgent matter?

A Not specifically, no, sir.

Q Did you know at the time you were asked to undertake the investigation that Robert Leuci had been a

witness at the trial of Edmund Posner?

A I probably did, yes, sir.

Q When you first spoke to Richard Lawrence, which I take it was between the 2nd and the 10th of January, did you believe that he was telling the truth?

MR. SAGOR: Objection, your Honor.

THE COURT: Sustained.

Q Did you ever tell anybody in the U. S. Attorney's office at any time between the 2nd and the 10th of January that you believed Richard Lawrence was telling the truth?

MR. SAGOR: Objection.

THE COURT: Sustained. It is immaterial whether he believed it or not. He was there to investigate the facts and find out what the facts were?

MR. DERSHOWITZ: The questionwas whether he communicated any such belief to any member of the U. S. Attorney's office.

THE COURT: Sustained.

Q Did there come a time when you made a decision that the Baron, Mr. Lawrence, should be subjected to a polygraph test?

A Yes, sir.

THE COURT: Will you read the question.

(Question read.)

THE COURT: That was your decision, I take it?

THE WITNESS: Yes, sir.

Q Was it your decision that the polygraph test should be administered by True Security in Virginia?

A By that specific organization?

Q Yes, sir.

A No, sir.

Q Whose decision was that?

A My superior, Mr. Patrick Fuller.

Q Did Mr. Fuller tell you the basis on which the decision was made to go to Virginia to conduct a polygraph test rather than have it conducted here in New York?

A That's not a true statement that you made there, no, sir. The reason it wasn't done here in New York was partly my decision.

Q Can you explain that decision?

A Yes. I was new in the New York area, I had never utilized the services of any of the examiners here in this area. Therefore, I didn't know either their competence or their trust. So I discussed this with my superior and we decided or he decided to do it in Washington.

Q Had you ever had any personal experience with any polygraph examiner in the Washington or Virginia area?

A No, sir.

Q To your knowledge, had the bureau for which you worked had extensive experience with this particular polygraph examiner?

MR. SAGOR: Objection. Isn't the question what did Mr. Fuller tell you, if anything, as opposed to the broad questions?

MR. DERSHOWITZ: Did he have any knowledge?

MR. SAGOR: Objection.

THE COURT: Tell us how the decision came about that the polygraph test was being administered in Washington or Virginia.

THE WITNESS: In Virginia, and the decision to use that particular agency was by Mr. Fuller.

THE COURT: Had Mr. Fuller had experience with that agency?

THE WITNESS: I don't know, sir.

THE COURT: He was your superior?

THE WITNESS: That's correct, sir.

THE COURT: Mr. Fuller decided where it should take place?

THE WITNESS: That's correct.

THE COURT: As far as you were concerned that ended that?

THE WITNESS: Yes, sir.

Q You are telling us now you do not know the reasons why your superiors made arrangements with True Security?

A He didn't specifically tell me we were going to use True Industries for X reasons.

Q Do you recall making the following statement under oath in your affidavit:

"My superiors in the BNDD had made arrangements with this firm based on prior experience and knowledge of their abilities in this area of technical investigation"?

A So?

Q I am asking you on what basis you knew that your superiors had made the arrangement with the firm based on prior experience and knowledge of their abilities in this area oftechnical investigation?

A I believe I stated that, sir.

Q Would you restate it?

A That my superiors in Washington, D.C. made the decision to utilize True Industries --

Q Did they do it,to your knowledge, on the basis

of prior experience and knowledge in their ability of technical investigation?

A I had that impression, yes.

Q On what basis did you have that impression?

A From my conversations with my superior, Mr. Fuller.

Q What did your superior, Mr. Fuller, tell you in that regard?

A Specifically?

Q In general.

A I don't recall his actual -- I think it was more impression or feeling from the conversation that I had with him that they had utilized them before but I don't know what specific cases or how often or anything of that nature.

Q But it was your clear impression they had used this company before?

A It's my impression, yes, sir, but I can't testify to that as fact.

Q Did you have a conversation with Mr. Mahoney from True Security?

A Yes, sir.

Q What did you tell him in that conversation?

A I told him that I wanted him to run a polygraph

examination of Mr. Lawrence and specifically what questions that I wanted him to ask during the examination.

Q Did you give him a list of questions that you wanted to be asked during the examination?

A I believe I did, yes, sir.

Q Have you seen the questions that were actually asked during the examination?

A Yes, sir, I have.

Q Were those the questions you asked him to put to Mr. Lawrence?

A I believe they were, yes, sir, without looking at them right here in front of me.

Q Would you just quickly look.

MR. SAGOR: Could we have an exhibit marked.

THE COURT: It's already in evidence.

MR. DERSHOWITZ: Let me use the one already marked.

THE COURT: There is one polygraph test that was marked in evidence this morning.

MR. SAGOR: I don't think he has the same in his hand.

MR. DERSHOWITZ: It's the same piece of paper which --

THE COURT: Let's do it in an orderly way and

use the one that has been marked in evidence. Wasn't it Exhibit 4?

MR. SAGOR: Yes, your Honor. I am handing Exhibit 4 in evidence to Mr. Dershowitz.

Q Would you look to see whether these were the questions that you asked Mr. Mahoney to put to Mr. Lawrence (handing)?

A Yes, sir.

Q Do you have any experience running a lie detector test?

A No, sir.

Q Did there come a time in the course of the lie detector test being administered to Mr. Lawrence that Mr. Mahoney came out of the room and had a conversation with you?

A Yes, sir.

Q Could you relate that conversation?

A Yes. He came out and asked if I had an objection to his changing the wording on one of the questions.

Q Do you recall which question it was?

A It is listed on the paper you have there, Exhibit 4. Would you like me to read it?

Q Which question it was. Just read it or

indicate it.

A It's B:

"Have you sold heroin more than 25 times between 1968 and January, 1972?" and it says down here in parentheses the question was subsequenyly amended at the subject's request to be "many times" instead of "25 times."

Q With the exception of that change elicited at the request of Mr. Lawrence, the questions put to Mr. Lawrence were the ones that you had asked to have put there?

A You confuse me, counselor. Would you rephrase that.

Q With the exception of that one change, these were the questions that you had asked to be put to Mr. Lawrence?

A To the best of my recollection at this time, yes, sir.

Q At that point or at any other point, while the test was being administered did Mr. Mahoney give you a preliminary or tentative appraisal as to Mr. Lawrence --

A Did you say at that time?

THE COURT: He said during the period while the test was being administered, during the administration, before it was concluded, did Mr. Mahoney tell you anything

about the way the test was going?

THE WITNESS: Yes, sir.

Q What did he tell you?

A He told me that he believed that Mr. Lawrence was lying.

Q Was that his first statement to you or did he say anything prior thereto?

A His first statement to me was the question you asked prior about changing the phrasing of the question.

Q Did there come a time in the process of the lie detector being administered that Mr. Mahoney told you he could not make a determination at this point as to whether or not Mr. Lawrence was deceptive?

A No, sir, he did not.

Q He consistently took the view that Mr. Lawrence was lying?

A Yes, sir. That's correct.

Q As to each and every one of the questions?

A I can't specifically say for each and every one of the questions. The overall impression I got from Mr. Mahoney was that he was lying.

Q Had you been given any instructions as to what to tell Mr. Lawrence in the event the lie detector test came out showing that he was not lying?

A No, sir.

Q Had you been given any instructions as to what to tell Mr. Lawrence in the event the lie detector test came out showing he was lying?

A No, sir.

Q What did you in fact tell Mr. Lawrence after the conclusion of the test?

A In Virginia?

Q In Virginia.

A I had told him that he was a liar and that I would take him back to New York and after our arrival in New York, he to go his way and I would go mine, and I didn't want to see him any more.

Q Did you then make a report to Mr. Norvillo?

A Yes, I did.

Q What did you tell him?

A I called him the next morning. I tried to get hold of him that evening. There was no answer. I called the next morning and advised him that Mr. Lawrence had failed the polygraph examination.

Q Did you describe the failure as something like having failed miserably, did you characterize it in any way?

A Yes, I told him that he failed the test com-

pletely.

Q Completely?

A Yes, sir.

Q Did you ever consider subjecting Mr. Lawrence to another lie detector test?

A No, sir, I did not.

Q Is it the usual practice of your agency to be satisfied with one, single lie detector test?

A I believe that that was the first time that my particular segment of the agency had used a polygraph.

Q Were you ever --

A Since I have been in charge.

Q Were you ever sent a copy or did you see a copy of the charts, the underlying polygraph charts?

A Yes, sir, I did.

Q Did you show those charts to any other experts?

A To any other polygraph experts? No, sir.

Q Did you show them to anybody?

A I took a formal copy to the United States Attorney's Office.

Q Of the charts?

A Well, no; of the results of the examination.

MR. SAGOR: May the witness be asked when.

I know this doesn't occur in defense counsel's examination but I think he should ask when the charts were brought over.

THE COURT: Let me first find out what it is you brought to the U. S. Attorney's Office. There is a report and actually we all know when this test is being administered there are various needles that move up and down and those are reproduced on a chart.

THE WITNESS: That is correct.

THE COURT: Let's regard the report as one thing and the chart as another. The chart being the movement of the needles.

What did you deliver to the United States Attorney's Office?

THE WITNESS: The report.

THE COURT: Including the chart with the needle pictured?

THE WITNESS: No, sir.

THE COURT: Just the report?

THE WITNESS: Just the final report.

THE COURT: When was that delivered to the United States Attorney's Office?

THE WITNESS: Approximately January the 21st of 1973.

THE COURT: Thank you. 1/21/73?

THE WITNESS: Yes, sir.

THE COURT: Did you get that, Professor?

MR. DERSHOWITZ: Yes.

BY MR. DERSHOWITZ:

Q Did you assign any aspect of the investigation to any person other than yourself?

A Yes, sir, I did.

Q Is Mr. Wolf that person?

A Yes.

Q Did you ask him to check out the allegations regarding car transfers?

A That is correct, sir.

Q Can you tell us what he told you?

A That the three cars we could only verify one that had actually been transferred to Mr. Leuci.

Q Had you been instructed that if the lie detector test were to come out positive, that you should undertake further investigations, that is, if the lie detector test had showed that Mr. Lawrence was telling the truth, that you should undertake further investigations?

MR. SAGOR: Objection.

THE COURT: No, I'll permit him to testify

what his instructions were.

MR. SAGOR: I have no objection to that question.

MR. DERSHOWITZ: That was the only question.

MR. SAGOR: There was an "if," Mr. Dershowitz.

THE COURT: I think the temperature is rising in direct proportion to the Fahrenheit outside, and I would appreciate it if we could keep it a little cooler here.

Go ahead.

Q Did you receive any instructions to conduct further investigations in the event that the lie detector test showed that he was telling the truth?

A I received no instructions on how to conduct the investigation at all, counsel.

Q At that time was it your expectation that you would conduct further investigations if the lie detector test showed he was telling the truth?

A Yes, I probably would have.

Q Could you tell us what further investigations you would have conducted?

THE COURT: Sustained.

MR. SAGOR: Objection.

THE COURT: Sustained. I said yesterday,

I said this morning, and just in case you doubt it, I say this afternoon, I shall not permit hypothetical questions.

MR. DERSHOWITZ: I tried to phrase that question.

THE COURT: Like "Would you have done"?

Q Did you have any plan in mind to conduct further investigation?

A No, sir.

MR. DERSHOWITZ: At this point, your Honor, with all respect, I would like to make an offer of proof that in fact if the lie detector test had shown the Baron to be telling the truth the United States Government would have conducted further investigations. I make this offer of proof on the basis of interviewws conducted by this Mr. Sherman prior to this discussion.

MR. SAGOR: I thought he said he would have in the event the lie detector test proved true or however, that there was some sense to the Baron's allegations, he would have conducted further investigations.

Isn't that what you just said?

THE COURT: Is that what you substantially said?

THE WITNESS: Yes, sir.

MR. DERSHOWITZ: Then there is no further quarrel on that score.

THE COURT: Go ahead.

Q Did you at any point speak to members of Mr. Nadjari's staff and inquire of them as to what information they had relating to allegations made by the Baron against Detective Leuci?

A No, sir, I did not.

Q Were you ever instructed by Mr. Morvillo to conduct as part of your investigation, to inquire of Mr. Nadjari's office as to what allegations they had against Mr. Leuci from the Baron?

A I wasn't instructed to do anything, sir.

Q You regarded it as simply you had free rein to conduct the investigation?

A That is --

Q Is it not the normal part of any investigation for a federal official to consult state officials with whom they have had prior contact to find out what information is in their files?

A That's a tough question to answer yes or no. Can I expound on it?

Q By all means.

A Yes, it would be normal. However, I basically

know what Mr. Nadjari was investigating as far as that is concerned and why check with him.

Q You knew what Mr. Nadjari was investigating?

MR. SAGOR: May the witness finish his answer?

THE COURT: Had you finished?

THE WITNESS: No.

THE COURT: Go ahead.

A I said basically what the Baron told Mr. Nadjari.

Q Did you know whether or not the Baron had given Mr. Nadjari any names other than John?

A No, sir.

Q Did you know whether or not the Baron had given Mr. Rogers' office any names other than John?

A No, sir.

Q Did you ever once ask anyone, either from Mr. Nadjari's office or Mr. Rogers' office, whether they had been given any names by the Baron other than the name John?

A The investigation didn't last that long, counselor.

Q Would you answer the question. Did you at any time ask anybody in either office whether they had any

names other than the name John Given to them by the Baron?

MR. SAGOR: Your Honor, I object to the question. If the question were what did he ask of Mr. Nadjari's office, I think we would move along a lot quicker.

THE COURT: Overruled.

Answer, please.

A No, I didn't ask them.

Q Now, is your explanation for why you didn't ask them that the investigation did not take that long?

A Yes, sir.

Q I thought you had said a minute ago that you were given free rein to conduct an investigation of whatever duration you felt to be appropriate.

A That is absolutely correct.

Q Why then did you not take the time to ask state officials as to the names of any people given to them by the Baron?

A Because the Baron agreed to take a polygraph examination, which he failed.

Q And as far as you were concerned, failing the polygraph examination put an end to the matter?

A That, coupled with other facts that could not be corroborated, yes, sir.

Q Did Morvillo concur with your assessment that the failing of the polygraph test coupled with whatever else you might have told them put an end to the matter?

A That is correct, sir.

Q Did you tell Mr. Morvillo that you had not inquired of these various state agencies as to whether or not their were other names?

A I don't know if I specifically told them that or not, no, sir. I don't know. I gave him a daily or every-other-day account of what was being done.

Q At the time when you were told that there would be no further investigation were you told that the matter was closed forever or wereyou asked to keep an eye on developments in regard to the Baron and Leuci? Was your job ended at that point?

A Yes, sir. I concluded the investigation in toto.

Q Did you submit a written report?

A No, sir, I did not.

Q Is it your normal practice to submit written reports of your investigations?

A To my own agency or to someone else?

Q To your own agent or to somebody in the United

States Attorney's Office.

A You say in the normal course of events, yes, sir.

Q Did you regard it as sufficient in this case to simply turn over the results of the polygraph examination?

A That's what I did.

MR. DERSHOWITZ: No further questions, your Honor.

CROSS EXAMINATION

BY MR. SAGOR:

Q Mr. Sherman, when was the first time that you ever heard the name Richard Lawrence?

A The first time?

Q Yes. In connection with your investigation.

A Connected with my investigation of --

Q Yes, that you just testified about. I want to direct your attention to on or about January 2, 1973.

A January the 2nd.

Q And who first mentioned the name Richard Lawrence to you on or about this time?

A I would say Mr. Frank Rogers.

Q What did Mr. Rogers tell you on January 2, 1973 about it, about --

A That there was an informant in his office who had information regarding corruption.

Q Did he tell you the name of the person?

A No.

Q And upon receiving this information from Mr. Rogers what did you then do, Mr. Sherman?

A I went to Mr. Rogers' office.

Q What happened there?

A I saw the Baron and had an interview with him.

Q What did the Baron tell you of his part -- first of all, who else was present at the interview?

A Upstairs was Mr. Wright who was an investigator for Mr. Rogers.

Q Yourself, the Baron and who else?

A I believe that was all.

Q What was said at that interview?

A Mr. Lawrence stated that he had had numerous narcotic activity with Mr. Leuci and he had also given Mr. Leuci three cars for narcotic transactions.

Q How long a period of time did this interview take on January 2nd?

A Very briefly. I'd say an hour. An hour and a half.

Q After the interview, what did you then do?

A Notified the United States Attorney's office and my superior.

Q Do you remember who in the United States Attorney's office you spoke to on January 2nd?

A I believe it was Mr. Morvillo.

Q Then what happened?

A A decision was made as to whether or not that I was going to conduct an investigation.

Q When was the decision made?

A Well, the decision was made the next day when I talked to Mr. Seymour.

Q This would be January 2, 1973?

A That would be January the 3rd, 1973.

Q What did you do after -- on January 3rd, 1973, thereafter?

A I followed the -- Mr. Lawrence in to conduct another more detailed interrogation.

Q Where did this interrogation take place, Mr. Sherman?

A It didn't take place because Mr. Lawrence couldn't come in. The next contact was on January the 5th when I received a call from Mr. Nadjari. I went to Mr. Nadjari's office.

Q Who did you see at Mr. Nadjari's office?

A I again saw Mr. Lawrence, I believe Mr. Joe Feeley, an investigator was there, and Joe Phillips of Mr. Nadjari's office.

Q Did a discussion take place on the 5th with Mr. Feeley or Mr. Phillips?

A Regarding the allegations --

Q Yes.

A Yes, they did.

Q What was said?

A Then we -- there would have to be a decision reached between Mr. Nadjari's office and the United States Attorney's office on which organization was actually going to investigate the allegations.

Q Then what happened?

A The decision was ultimately reached on, I believe

it was January the 10th.

Q In the meantime, though, what happened on January 5th, aside from this conversation that you had with Messrs. Phillips and Feeley?

A I brought Mr. Lawrence into my office and debriefed him again for probably an hour and a half.

Q Where was your office, Mr. Sherman?

A 26 Federal Plaza.

Q Who else was present at that interview on January 5th between yourself and Lawrence, if you remember?

A I don't believe anybody was there.

Q Then what happened?

A He left my office and nothing happened until the 10th.

Q Did you interview Lawrence again on January 10th?

A Yes, I did.

Q Did there come a time in connection with your investigation that you assigned other agents to assist you in the investigation?

A That is correct.

MR. DERSHOWITZ: Your Honor, I object. It seems to me we are going over exactly the same grounds as I went over on direct.

THE COURT: Overruled.

Q Who else did you assign?

A Inspector Wolf.

Q When did you assign Mr. Wolf to assist you in the investigation?

A It was either in the late afternoon hours of the 10th or early morning of the 11th.

Q There came a time, did there not, that you asked the Baron to take a lie detector test, is that correct?

A That is correct, sir.

Q Prior to that time, before asking him to take a lie detector test, would you tell us what investigation was conducted by yourself and Mr. Wolf concerning, for example, the allegation about this person named John?

First of all, tell us what that allegation was, according to what the Baron told you.

A Mr. Lawrence told me that in approximately the fall of 1968, that he was introduced to a white male by the name of John, that John was to be the go-between between Mr. Leuci and between Mr. Lawrence. That he, on numerous occasions, either took drugs from John or gave John money or vice versa. I asked him that during this period of time that you never knew more about him than his name was John. He told me no. All the information was quite

general. And that's about it.

Q How long did Lawrence say that he had dealt with John as Leuci's so-called connection?

A From late '68 to date.

Q How many times did the Baron say that he had spoken to this John?

A On numerous occasions.

Q Can you estimate the amount of occasions that he might have told you that?

A No, sir.

Q Hundreds?

A No, sir. He didn't say.

Q He just said numerous occasions.

Did he know John's last name?

A No.

Q Did he describe him as a fireman, perhaps?

A He said that he felt he was a fireman because he wore dungarees and wore plain military-type shoes.

Q What other description did he give you concerning John?

A Six feet. Medium built. Dark hair.

Q Did he tell you where John lived?

A No, sir. He said he didn't know.

Q Did he know where John lived?

A He said he didn't.

Q Did he have his telephone number?

A No, sir.

Q Did he tell you how John ever contacted Lawrence?

A Either he would contact Lawrence or Leuci would get hold of him.

Q But Baron never said he ever contacted John, is that correct?

A That's correct.

Q And how did John ever know where to contact Lawrence, did he tell you that?

MR. DERSHOWITZ: Objection, how did John ever know --

THE COURT: Rephrase the question, please.

Q What did the Baron tell you as to John ever contacted him?

A He always got a hold of him.

THE COURT: Put names on that.

THE WITNESS: John Doe, John always reached the Baron.

Q Did the Baron explain how John knew where the Baron was?

A He had the Baron's telephone number.

Q And he called the Baron?

A That's correct.

Q But the Baron never knew where he was calling from, is that correct?

A That's what he said, yes, sir.

Q Did the Baron give you information about a dress shop or something to this effect or a store?

A A men's store?

Q Yes.

A Yes, sir.

Q What did the Baron tell you about the men's store?

A He stated that in the summer of 1971, that Mr. Leuci called him, told him to come to the Brooklyn District Attorney's office, which he did. Upon his arrival at the Brooklyn District Attorney's office, he introduced him to a John Doe Robert, told him to deliver a quarter kilo of heroin to Robert in the park immediately adjacent to the District Attorney's office, which he did. And further inquiry as to did he get a definite identification of this John Doe Robert, the only thing Mr. Lawrence could say was that he owned a men's store on Utica Avenue two blocks south of Eastern Avenue in Brooklyn.

Q And what was the --

THE COURT: Eastern Avenue or Eastern Parkway?

THE WITNESS: He said Eastern Avenue.

THE COURT: Go ahead.

Q What did he say the importance was of this store on Eastern Avenue?

A John Doe Robert was alleged to have owned that store.

Q What connection did John Doe Robert have allegedly with Leuci, according to the Baron?

A He was supposed to deliver a quarter kilo of heroin to him.

Q He was -- John Doe Robert was allegedly Leuci's connection for that quarter kilo of heroin?

MR. DERSHOWITZ: Objection, your Honor. That's a characterization.

"According to what the Barron said."

THE COURT: Just ask him what the Baron said.

MR. SAGOR: I really wanted to save time. I know the appropriate questions but I wanted to cut through--

THE COURT: Please do the appropriate thing.

Q Did there come a time when you went with the Baron to check out his allegation concerning this store on Eastern Avenue?

A I didn't go out there, no, sir.

Q To your knowledge did one of your investigative

staff go with the Baron?

A Yes.

Q Can you tell us what happened according to your knowledge?

A The store did not exist at that corner.

Q Could the Baron locate the store?

A No, sir.

Q Did the Baron go with the agent according to your knowledge and direction to find the so-called store?

A No, he didn't go, but we talked to him on the phone to get exact directions to the place. He was also told that the place did not exist and he said that it was exactly on that corner.

Q Now, Mr. Sherman, according to what you had been told by the Baron concerning the so-called John, did you believe any such John existed?

MR. DERSHOWITZ: Objection, your Honor. If we can't ask about belief, they can't.

THE COURT: Sustained.

Q During the course of your conversations with the Baron without pinpointing it this moment on January 2nd, January 5th, January 10th, did the Baron talk to you about money?

A Money for his own personal use?

Q Yes.

A Yes. Yes, he did.

Q Would you tell us that conversation?

A He wanted payment for the information that he was giving.

Q Let's take it from day one.

What was the first conversation when you met the Baron? Was there any conversation about money on January 2nd?

A That's correct.

Q Can you tell us when in the conversation the Baron started to talk about money, without going through the whole conversation now?

A At the end of the interview.

Q What had the Baron told you on January 2nd of alleged corruption of Detective Leuci?

A That he had been engaged in narcotic transactions with Leuci since 1968.

Q Did he tell you any specifics of that?

A He never gave any real specifs. It was generalities throughout all of the interrogations.

Q At the end of the interview, what did the Baron say about wanting money?

A He wanted to know if I would pay any funds for

this information.

Q How much did he specify, if he did?

A He wanted a thousand dollars a month.

Q A thousand dollars a month?

A A thousand dollars a month for the time that he worked with him.

Q How much if any did he want in connection with that interview with you? Did he want an amount then and there?

A He wanted a thousand dollars.

Q What did you tell him?

A I told him that I wouldn't pay him a dime until I could corroborate his information.

Q Then what happened on the next interview concerning a statement about money?

A He wanted money. I gave him the same answer.

THE COURT: Was this on the 5th?

THE WITNESS: Yes, sir.

Q What did he say, Mr. Sherman?

A He asked if I will start pahing him the money and I told him no, that I had already told him I wouldn't pay him any funds until I was able to corroborate his allegations.

Q At that time did he give you further details so

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you could corroborate any of his allegations?

A No.

Q And you saw him again on the 10th. Was there another discussion like the one you have just testified about on the 10th too?

A Yes.

Q Is it fair to say that was a continuing theme of a discussion with the Baron, a thousand dollars a month or not giving further information?

A Every time I talked to him he wanted money.

Q Did he imply that he would not give further information unless he got paid the thousand dollars a month?

A I told him that I wasn't going to give him any money at all until he gave me some information that I could corroborate.

THE COURT: Since we are on this subject, did you ever give him any money?

THE WITNESS: No, I didn't.

Q You had known, had you not, that back in 1974 for some portion the Federal Government had, in fact, given Lawrence money, is that correct?

A That is correct, sir.

Q And you also knew, did you not, that there came a

time when the Baron was, to use the vernacular, kicked out of the program, is that correct?

A That is corredt.

Q Is it fair to say that during the course of the interviews you had with the Baron on the 2nd, 5th and 10th, that the Baron was very unhappy about being taken off the Federal payroll, is that correct?

A Yes, I would say so.

Q And do you know why the Baron was dropped from the corruption investigation?

A I know what I was told, yes, sir.

Q What were you told?

A That they paid him a lot of money and received no results for the money they had spent.

Q Now, Mr. Sherman, did you take written notes of your interviews with the Baron on the 2nd, 5th and 9th?

A Yes, sir.

Q Did there come a time when you incorporated your written notes into a final written statement of what the Baron told you?

A A composite of the allegations, yes, sir.

Q And do you have that with you?

A No, sir. I believe you have --

Q If I show you a Xerox copy, would you be able to identify that?

A Yes, sir.

MR. SAGOR: May I have a moment, your Honor?

THE COURT: Yes.

Why don't we take the afternoon recess now.

Ten minutes. I'll expect everybody back at 3.30. We shall resume promptly at 3.30.

(Recess.)

THE COURT: You may proceed.

MR. SAGOR: I have just a few more questions.

BY MR. SAGOR:

Q Mr. Sherman, prior to January 2nd, 1973, you had previously met the Baron, is that right?

A That is correct, sir.

Q You had dealt with him in connection with the corruption investigation I just alluded to?

A I had dealt with him?

Q Had you, by the way?

A No, sir.

Q But you had met him before?

A I had met him, yes, sir.

Q Did there come a time from the period January 2nd to January 17th, when you or one of your agents asked the Baron to have him come with you to locate John?

A That is correct, sir.

Q Would you tell us what, if anything, you said to Lawrence on that subejct?

A I specifically asked Mr. Lawrence to spend some time to come out and try to find John, and I don't recall the reason at this time, b ut he had something else to do at that particular time. We never got him out to find this alleged John, and then the polygraph examination came up and we concluded the investigation.

Q You say you conducted this investigation, and

also one of your agents. Is that Special Agent William Wolf?

A That's correct.

Q How many hours did you and Mr. Wolf spend on this investigation?

A It was approximately 60 to 65 man hours in about a week's period of time.

Q Have you recently read the Baron's affidavit submitted March 20th, 1974?

A That is correct, sir.

Q Are there some references to cars in those affidavits, makes of cars?

A I believe there, are, yes, sir.

Q To your knowledge, are the cars that the Baron has in his affidavit today the same year-end model numbers and the cars he gave you back in January '73?

A I believe there are some discrepancies in the actual year nodels with the vehicles with that what Mr. Lawrence gave me in January.

Q There came a time that you were in Mr. Morvillo's office, is that correct?

A Yes, sir.

Q I'm sorry, January 21st, or thereabouts in 1973?

A That is correct, sir.

Q And there was a discussion about whether or not to continues the investigation?

A That is correct, sir.

Q And there was something to the effect of whether or not there should be a written report, do you remember that?

A Would you state that --

Q There was some discussion on January 21st whether or not there should be a written report?

A That is correct, sir.

Q Can you tell me again what you said and what Mr. Morvillo said, as best you remember it?

A I asked Mr. Morvillo if he wanted a written report regarding our investigation, and he stated no, that he felt that the final report from the polygraph examiner would be sufficient

Q When Mr. Morvillo said that that final report, whether that would be sufficient, what was he referring to?

MR. DERSHOWITZ: Objection, your Honor.

THE COURT: If you know.

Q If you know?

A He was referring to the polygraph examination report.

Q It is fair to say, is it not, that your dis-

cussion with Mr. Morvillo about the facts why you should discontinue the investigation did not only include the polygraph report; is that correct?

A That is true.

Q What Mr. Morvillo was saying when he said sufficient, if you know --

MR. DERSHOWITZ: Objection.

THE COURT: What are you objecting to?

MR. DERSHOWITZ: He didn't ask for conversation.

MR. SAGOR: This is cross, your Honor.

THE COURT: That doesn't mean you can rummage around somebody's mind.

Q Is it fair to say when Mr. Morvillo used the word "sufficient", was he meaning that the lie detector test was the only thing sufficient for purposes of terminating the investigation?

MR. DERSHOWITZ: Objection, your Honor.

THE COURT: Sustained.

MR. SAGOR: May I have a moment, your Honor?

THE COURT: Yes.

What did you say your specific postion was in the Service?

THE WITNESS: O'm the inspector in charge of the Northeast Field Office of Inspections, Drug Enforcement

Administration.

Q Mr. Sherman, is it your practice when you conclude all investigations to write a written report?

A Normally, yes, sir.

Q Are there times when you do not write a written concluding report?

A That has happened on occasion, yes, sir.

Q As of January, 1973 did you maintain a file of the investigation concerning the Baron's allegations?

A That is correct, sir.

Q Was that file made in the ordinary course of the Inspection Service?

A That is correct, sir.

Q Was it maintained to this date in the ordinary course of the Inspection Service's business?

A Yes, sir.

Q Are there written reports in those files?

A There are different types of reports in there, yes. There is not a formal, final report but there are handwritten notes, all the information we could find about the vehicles, et cetera.

Q Is it fair to say that you do not feel that it was necessary to conclude a final report?

A No, I didn't. Anything I needed to know was in the file.

Q By the way, what would be the practice with respect to a final report? Would that include everything you did from day 1 or might that just be a final report

which stated: Investigation closed, no substantiation, no corroboration?

A It could be either way. It could be a synposis of the total investigation or it could be just a memo in the files stating "Closed."

Q Did you feel it was necessary under the circumstances to put a memo into the file indicating that the case was closed?

A No, sir, I did not.

Q Did you mark the file in any way that the case was closed?

A No, sir.

Q Did you put a memorandum in of your discussion with Mr. Morvillo?

A I don't believe I did, no, sir.

Q Did you put any notations on the file in any way?

A No, sir.

Q Mr. Sherman, is it fair to say,as a final question, that as you sit there now you believe that your investigation was fully and fairly conducted?

A Yes, sir, I do.

MR. SAGOR: No further questions.

MR. DERSHOWITZ: Your Honor, before the

recess the government marked for identification a file and we have never seen it.

THE COURT: I didn't know it was a file. I thought it was short of a memorandum more than a file. What did you mark?

MR. SAGOR: I didn't mark anything. I was looking through some papers.

THE COURT: At the recess you were talking about -- was it reports made by Mr. Sherman?

MR. SAGOR: His handwritten notes, your Honor.

THE COURT: We recessed at that time. Did you have those marked?

MR. SAGOR: I didn't have then marked. I didn't want to get into this.

MR. DERSHOWITZ: May we see the notes that were referred to on the examination of the witness and the file?

MR. SAGOR: Your Honor, we are going to be here for days. I object to it. I will hand it up to the court and --

THE COURT: I am not going to read everything. I've got a stack that high already.

MR. DERSHOWITZ: This was opened by the

government, your Honor.

THE COURT: Just a moment. I would like to be able to complete what I'm supposed to be going through now. You were the one who raised this in the first place.

MR. SAGOR: I decided not to put it in, your Honor. I merely said did you incorporate in a written memorandum your notes. I looked at it and I decided to get into the nittygritty.

Let the record reflect Mr. Sherman had an extensive interview with defense counsel and I believe he would have made available anything they wanted to look at, and --

THE COURT: What is your application, Mr. Dershowitz?

MR. DERSHOWITZ: Since the last 10 minutes of examination of Mr. Sherman, since that was based on a file about which he was questioned, we are entitled to see that file.

THE COURT: Very well. Turn over that memorandum, please.

MR. SAGOR: Your Honor, it is five pages perhaps.

THE COURT: Mark it for identification first.

(Government's Exhibit 6 was marked for identification.)

REDIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q Mr. Sherman, before coming here today did you refresh your recollection by looking at a file involving the Leuci case?

A That piece of paper that you have there, sir.

Q Did you look at anything else in that file?

A Not other than what you have already received in out-of-courtroom interviews.

Q As I understand it, there is a file that was referred to on your direct examination which includes all the evidence accumulated in 65 man-hours of investigation. Did you look at that file?

A That piece ofpaper, counsel.

Q You looked only at this piece of paper?

A Yes.

THE COURT: That's what he said for the third time.

Q Can you tell us what else is in that file?

A I believe I already have, counsellor. There are handwritten notes, documents on the car search, there is a document in there on where the men's store is located,

and that's all I recall that's in there.

Q Did you look at the documents about the car search in preparation for your testimony today?

A Yes, sir. I already told you that. You already have those, counselor.

Q I do not have those.

THE COURT: Show him what you have, Mr. Dershowitz.

MR. DERSHOWITZ: I have only --

THE COURT: Show him what you have.

MR. DERSHOWITZ: -- four or five handwritten notes.

MR. SAGOR: Maybe Miss Baker or some other counsel has something.

MR. DERSHOWITZ: I am told these files are in Mr. Wolf's possession, who is the person assigned.

THE WITNESS: It was my understanding, counselor, that Miss Baker took them when she was interviewing, or a copy of them anyway.

THE COURT: Well, they have been made available to you in any event. Proceed, please.

BY MR. DERSHOWITZ:

Q Did you look at a document relating to the store on Utica Avenue?

A Yes, sir, I did.

MR. DERSHOWITZ: May we have that document?

MR. SAGOR: Mr. Clerk, would you mark it 7 for identification.

(Government's Exhibit 7 was marked for identification.)

Q Can you think of any other document, other than the three that have now been mentioned, Utica, Avenue, car transfers and the handwritten notes you looked at in preparation for your examination?

A I looked at a copy of my affidavit. I looked at a copy of Mr. Lawrence's affidavit. I looked at your affidavit. Other than that, that's all.

Q Nothing else from that file?

A That is the file, counselor.

Q So the file, as I understand, contains in

toto the following documents: a handwritten series that you have just looked at, some information about a men's store on Utica Avenue, information about car transfers, and the documents that we have filed in this case, and nothing else?

A It also has some handwritten notes of Mr. Wolf, which I did not look at.

Q Okay. We will add to that, handwritten notes of Mr. Wolf. Is there anything else?

A Not to my knowledge.

Q You have told us that under your supervision, somebody went out and looked for a store on Utica and Eastern Avenue.

A That is correct, sir.

Q And you did not find a store on Utica and Eastern Avenue?

A That is correct, sir.

Q Did you find Eastern Avenue?

THE COURT: He didn't say he went.

A I didn't go, counselor.

Q Were you told that an Eastern Avenue was found?

A Yes, sir.

Q It is your testimony here today that there is

an Eastern Avenue in the Borough of Brooklyn?

A I can't testify to that, counselor. I have never been on the street.

Q Were you told that a check was made of Eastern Avenue in Brooklyn?

A To the best of my recollection, yes, sir.

Q And it was your testimony that you never or nobody on your staff ever went with the Baron to try to find this store on Utica and Eastern Avenue?

A We have talked to the Baron. We tried to get him to go out. He didn't want to go out or he didn't have the time available. We got specific directions of where this place was at and it wasn't there.

Q And the specific instructions were it was on Eastern Avenue?

A No, sir. It was on Utica Avenue, two blocks south.

Q Of Eastern Avenue?

A That is correct.

Q And that's where you looked and that's where you instructed your people to look?

A That's correct.

Q Did you ever turn the file, as distinguished from the memorandum on the polygraph test, the file that

Mr. Sagor questioned you about, did you ever turn that file over to Mr. Morvillo?

A No, sir.

Q Has that file been retained in the possession of your office consistently?

A That is correct, sir.

Q You testified on cross examination that there were discrepancies between the description of the automobile given by the Baron in his interview with you and in his subsequent affidavit of this year. Could you tell us precisely what these discrepancies were, if you remember?

A I can't think for sure. It seems to me, remembering from having read the affidavit once, that the affidavit states a 1966 Ford, and I believe that the information that Mr. Lawrence gave us was a 1967 Ford.

Q Do you remember whether there were any other discrepancies?

A There were other discrepancies in the affidavit, yes, but not pertaining to that particular point.

Q I am asking you whether there were any other discrepancies with regard to the cars, the transfer of cars between the affidavit and what you were told back in 1973.

A I don't recall offhand.

Q You only recall one discrepancy at the present time?

MR. SAGOR: As to cars is that question?

MR. DERSHOWITZ: As to cars.

MR. SAGOR: I understand the agent who did the work on the cars is back there. I don't say we should ever get into it but at least for the cars, he is waiting in the wings.

MR. DERSHOWITZ: He is going to be our next witness or the one after that, your Honor. We will be questioning him about that.

Q You mentioned that the Baron had asked you for money.

A Yes, sir.

Q Is it not the usual practice when dealing with informants of that kind that they will ask you for money in exchange for the information?

A Yes, sir, it is.

MR. DERSHOWITZ: No further questions.

MR. SAGOR: No recross.

THE COURT: You may step down.

(Witness excused.)

THE COURT: Call your next witness.

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MR. DERSHOWITZ: Patrick Fuller, please.

THE COURT: Call Mr. Fuller.

While we are doing that, Mr. Dershowitz and Mr. Sagor, how many more witnesses do you anticipate will be called during this hearing?

MR. DERSHOWITZ: Today?

THE COURT: No, all told.

MR. DERSHOWITZ: Our best estimate I think is between six and eight witnesses.

THE COURT: In addition to those we already heard?

Gentlemen, we will sit Friday and Saturday on this case if it is necessary to complete it.

(Witness excused.)

P A T R I C K W. F U L L E R, called as a witness by defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q Mr. Fuller, good afternoon.

A Good afternoon.

Q Were you Chuck Sherman's superior in January, 1963?

A Yes, I was.

Q Did there come a time when you heard that Mr. Sherman was given an assignment to conduct an investigation of one Richard Lawrence?

A Do you mind if I restate that? There came a time when Mr. Sherman was working with -- was working on a case involving Lawrence, yes.

THE COURT: Before we get to that, what is your title, sir?

THE WITNESS: At the present time I am the inspector in charge of the western field office of the Office of Inspection and Internal Security, DEA.

THE COURT: Just a moment, please.

What was your job in January, '73? Was it the same?

THE WITNESS: No. I was chief inspector for the Bureau of Narcotics and Dangerous Drugs.

THE COURT: Go ahead, Mr. Dershowitz.

Q At that time what was Mr. Sherman's normal investigative job?

A He was the inspector in charge of the New York office and his responsibilities generally were to conduct any investigations in his area of responsibility which related to employees of BNDD.

Q Was the assignment that you just described,

the assignment to investigate allegations made by Richard Lawrence against Detective Leuci, within his normal range of responsibilities?

A Well, I am going to have to restate that too.

At that time Mr. Sherman was involved in investigations relating to employees which also involved the Baron.

Q Was there any time when you stated an objection to Mr. Sherman being given the investigative task that he was given?

MR. SAGOR: Objection.

A Not in the context --

THE COURT: Don't answer when an objection is made.

THE WITNESS: I do not recognize that man.

THE COURT: He is the assistant United States attorney.

Read the question and --

MR. DERSHOWITZ: I will withdraw that question.

Q Did you receive a call from Mr. Ingersoll, the director of the BHDD, during that period of time in January, 1973?

A Undoubtedly I did, but with regard to this

matter I am not sure. I was on the same floor and the same building and a few paces away.

Q Do you recall --

MR. SAGOR: Excuse me, your Honor. Can we have an offer of proof. I must say to suit this court -- we have brought this man from Los Angeles on the good faith of Mr. Dershowitz. Looking at the questions now I think the taxpayers have been badly abused by this trip to keep these proceedings going and I think we ought to have an offer of proof to --

THE COURT: Get to the point, Mr. Dershowitz.

MR. DERSHOWITZ: We have been told in advance there was going to be a speech about taxpayer's money.

THE COURT: I don't care about that. I am suggesting you get to the point.

MR. DERSHOWITZ: We are trying to.

THE COURT: Do it more quickly.

Q Do you recall having any discussion at all with Mr. Intersoll in the month of January in reference to the investigation that Mr. Sherman was asked to conduct of Richard Lawrence's allegations?

A I repeatedly discussed all major investigations with Mr. Ingersoll, so my answer would automatically have to be yes.

Q Did you at any point state an objection to Mr. Ingersoll or anybody else in that office regarding the appropriateness of Mr. Sherman conducting this particular investigation?

A If you are talking about Mr. Baron and his relation to other employees, I did not.

Q I am talking about the investigation of the Baron and his allegations concerning Detective Leuci.

MR. SAGOR: Objection, your Honor, the investigation was conducted by a responsible agency --

MR. DERSHOWITZ: That is what we are trying --

THE COURT: Just a moment. The objection is sustained. The only possible relevancy I can see to this gentleman's testimony is the selection of polygraph test. That is the reason I thought you put him on the stand and that is what I am going to limit you to.

MR. DERSHOWITZ: That is what we were getting to.

THE COURT: Get to it.

MR. DERSHOWITZ: May we make an offer of proof at this time?

THE COURT: Yes.

MR. DERSHOWITZ: The offer is objections were raised as to the appropriateness of this investigation. That Mr. Ingersoll said that somebody high up in the U. S. Attorney's office must have -- must have arranged for this investigation to have occurred and this investigation was not a normal and acceptable one for a person of Mr. Sherman to undertake.

THE COURT: All right. You made your offer of proof. Now get to the point.

Q Mr. Fuller did there come a time when you selected true security to conduct the lie detector examination of one Richard Lawrence?

A Yes.

Q On what basis did you select True Security?

A One, we decided not to conduct it in New York City. That's No. 1.

No. 2, True -- I have forgotten the other word.

Q Security.

A Security was a brand new name. The head of that office I had known and knew his reputation and his back-

ground. They had no preconceived notions or prejudices at that time and I had read the literature published at the time the office was opened. So I just selected them.

Q Would it be fair to say you read a brochure that they had circulated about their new business?

A Yes. I recall there was a brochure about the new office opening.

Q At the time you selected this particular company, had your office, the BNDD, had any experience whatsoever with this office, with True Security?

A No.

Q Had they ever previously asked True Security to conduct any other investigations?

A Restricting my answer to the Chief Inspector's office, no.

Q Did you have any information about Mr. True's specific competency as a polygraph examiner?

A Mr. True is not a polygraph examiner.

Q Did you have any specific information about Mr. Mahoney's competence as a polygraph examiner?

A I recall reading the literature which set out Mr. Mahoney's -- my recollection is it set out Mr. Mahoney's qualifications and I had talked to Mr. True prior to his going into business, as to whom he was going to hire in that

area.

Q In addition to the brochure and the statement by Mr. True, did you have any other outside information about Mr. Mahoney's qualifications as a polygraph examiner?

A I did not.

Q Had you known whether or not Mr. Mahoney had conducted any other polygraph examinations for your Bureau?

A Of my own knowledge, no.

Q Did you state to anybody that one of the reasons why you selected True was because they were a new company and they needed business?

A No.

Q Did you know Mr. True from the CIA?

A Yes.

Q Did you know whether or not Mr. True had ever engaged in security work, outside of the Government?

A I don't believe he had.

Q You wouldn't, by any chance, have retained a copy of the brochure that you read?

A No, I did no.

Q Was it generally an advertising brochure?

A Yes. It was for public dissemination.

Q You received it in the normal course of your --

A I think we received several in the office.

Addressed to different people. 426

MR. DERSHOWITZ: No further questions, your Honor.

THE COURT: Any questions?

MR. DERSHOWITZ: Your Honor, may I ask one further question?

THE COURT: Yes.

BY MR. DERSHOWITZ:

Q Do you recall receiving a memorandum in 1972, July, from a man named Goe?

A Mr. Goe was an inspector. I undoubtedly received many memoranda from Mr. Goe.

Q Do you remember a particular memorandum which described an incident where Detective Leuci admitted to Mr. Goe sharing in $200 that were taken, that was taken in an arrest which Detective Leuci and various New York City police and Federal agents participated?

A Prior to reviewing that memorandum today, I did not have specific memory recollection of that particular memorandum. However, I do recall the information contained in the memorandum. Therefore, I must assume that I received the memorandum or discussed it in its entirety with Mr. Goe.

Q In the normal course of events, what would your

office do with such a memorandum?

MR. SAGOR: Objection.

THE COURT: No, what was the practice is a perfectly proper question. And I will accept Professor Dershowitz' substitution of language.

What was the practice of your office with respect to memoranda of the type -- of the type of the Goe memorandum? In what respect may I ask, in terms of filing, keeping --

MR. DERSHOWITZ: Filing, keeping, disseminating.

THE COURT: Can you answer that question?

THE WITNESS: Yes.

THE COURT: Please do.

THE WITNESS: There would be a file copy of that memorandum and they would be retained in the Inspection Office.

Q Would you send copies of it to other agencies of the Government?

A It would depend on the nature of the memorandum. Not routinely. We would have some -- some other agency would have a very direct point of entrance in it.

Q If an investigation is being conducted of a given subject, such as Detective Leuci, would it be the normal practice to keep the United States Attorney's office

apprised of information of this kind?

MR. SAGOR: Objection. What was done with this memorandum. Can't that be the question, your Honor.

THE COURT: Overruled.

You may answer.

A At that time Mr. Goe was in fact liaison for Inspection with the United States Attorney's office in New York. He was the Washington liaison.

The answer to your question is I would not have sent it to the United States Attorney's office routinely.

Q Would it have been your expectation on the basis of Mr. Goe's position as liaison that this information would otherwise be brought to the attention of the U. S. Attorney's office?

MR. SAGOR: Objection.

THE COURT: Sustained.

Q Would you explain to us your previous answer, why you would not have brought this material necessarily to the attention of the U. S. Attorney's office?

MR. SAGOR: Objection.

THE COURT: Sustained.

Q You testified that because Mr. Goe was the liaison officer, therefore you would not normally, you would not normally bring this to the attention of the

U. S. Attorney's office.

Would you explain why not?

MR. SAGOR: Objection.

THE COURT: Sustained.

Q Do you know for a fact whether or not this particular memorandum or its contents were brought to the attention of the United States Attorney's offfice?

A Of my own knowledge, I do not.

Q Would it be the normal practice of your office to assure that information of this kind be obtained by the United States Attorney's office in the course of an investigation?

A Of course.

MR. DERSHOWITZ: No further questions.

MR. SAGOR: Your Honor, I could only note that he was asked about the Goe memorandum as an extra thought.

Can we excuse this man to go back and never come back herein case counsel has a bright idea? I would like to let him go.

THE COURT: Do you have any questions?

MR. SAGOR: I have no questions.

THE COURT: Have you finished?

MR. DERSHOWITZ: Can I have 30 seconds, your Honor. I think we have.

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No further questions.

THE COURT: You are excused, sir.

(Witness excused.)

THE COURT: Call your next witness, please.

MR. TAIKEFF: Your Honor, may I have a moment to confer with Mr. Dershowitz?

THE COURT: Yes.

I would expect by now counsel would have pretty well determined the order of witnesses. Go ahead and confer and call the next witness.

MR. SAGOR: Your Honor, there is one suggestion. Mr. Cunningham from Mr. Roger's office, a busy prosecutor is here at the request of defense counsel. I don't want to interfere, but may I ask that he be called. I don't press it, your Honor.

MR. DERSHOWITZ: I'm sorry, I didn't hear that.

THE COURT: He is asking for Mr. Cunningham next. It's up to you.

MR. DERSHOWITZ: Your Honor, at a quick look of this extraordinary five-page written memorandum, which the Government has turned over to us in the Sherman matter, we must insist on recalling him.

THE COURT: Put Mr. Sherman on the stand if he is here.

MR. DERSHOWITZ: There are numerous names and --

THE COURT: I have done what you asked me to do. Don't continue to make speeches.

- -

C H A R L E S F. S H E R M A N, recalled as a witness, having been previously duly sworn, testified further as follows:

REDIRECT EXAMINATION (Continued)

BY MR. DERSHOWTIZ:

Q Mr. Sherman, is it your testimony that the only

name that was given to you by the Baron in his interviews and your interviews with him was John?

A I don't believe I said that, no, sir.

Q Could you tell us whether there were other names that were given to you by the Baron?

A General name.

Q Such as?

THE COURT: Why the complete silence? Read the question and answer.

(Question and answer read.)

Q Did you ever tell Mr. Morvillo that the Baron gave you names other than John?

MR. SAGOR: Objection, your Honor. Names of what?

MR. DERSHOWITZ: Names of people.

MR. SAGOR: What's the relevance of names of people?

MR. DERSHOWITZ: We have sworn testimony by an Assistant U. S. Attorney that he received no other names but John. That's the relevance.

MR. SAGOR: Your Honor, names as to what?

THE COURT: All right, gentlemen. Sustained as to the form in which the question is put.

Q Did you ever tell Mr. Morvillo that Mr. Lawrence,

in his discussions with you, had mentioned names of people other than John as being involved in drug transactions?

A I don't recall, Counselor.

Q Do you recall having told him that there was only one person who was named John?

A I don't believe I said there was only one name, no, sir.

Q Do you recall whether you ever told him about any other people?

MR. SAGOR: Objection. Regarding to what? What is the relevance?

THE COURT: I take it, and you must understand, that he is asking whether or not he told Mr. Morvillo that the Baron, so-called, mentioned other people as having been involved in transactions with Leuci?

MR. SAGOR: That's exactly right, your Honor. What is here is a list of defendants that the Baron has been involved in with Leuci, not that these defendants have given Leuci's stuff. Of course, there are other names mentioned.

THE COURT: Let me see it.

MR. DERSHOWITZ: Let's go down one by one.

THE COURT: I'll decide whether we will go down one by one.

Who is Larry referred to here?

THE WITNESS: That's Mr. Lawrence.

THE COURT: I will just take this instance by instance and rule with respect to that.

With respect to the paragraph numbered 5, notation:

"Larry got 4 ounces or more of brown stuff from John," nobody is mentioned in that paragraph but Larry, John and Leuci, so we can live without that.

Now, in paragraph numbered 6, Larry was to get $4000 and never got the money. No drugs received. We can sustain an objection as to that. There is no name there other than John, Larry or Leuci.

MR. DERSHOWITZ: How about John, Herowitz and Markowitz?

THE COURT: That's just the name of a defendant in a bust, apparently.

7. Seizure 1 kilo. Larry got 4 ounces from Leuci. No money given back. Sustained.

8. Seizure case in Astoria, I guess it is, half kilo, and Larry got 3 ounces from Leuci, unknown amount.

With respect to everything above the line on which 9 starts, there is no mention of anybody but John

or Larry or Leuci except for the name of the people who were busted in the particular case, if I may indulge in that colloquialism.

With respect to No. 9 here, I can't read the small handwriting.

Will you read that out loud, if you can.

Do you see what I mean?

THE WITNESS: "Guy named Wells-Colorado."

THE COURT: What does that mean, if anything?

THE WITNESS: Could I read the rest of the paragraph?

THE COURT: Sure. Then there are more names at the end of that. Tell me what they mean.

THE WITNESS: This Wells from Colorado and Gina Blackmore and Dale Lopez in Denver, and Lee Scott Wingerman were all arrested -- these are --

THE COURT: Those are the names of people arrested?

THE WITNESS: Yes, sir.

THE COURT: The same as in the previous ones?

THE WITNESS: Yes, sir.

THE COURT: The Government's objection is sustained.

Q Mr. Sherman, did you ever conduct an investigation

to determine whether or not Leuci was introduced to the Baron by Scott Watson and George Bermudas?

A No, sir, I did not.

Q Those names, however, were given to you by the Baron?

A That is correct, sir. As I told you earlier, when I was in here testifying, the total investigation was brought to conclusion subsequent to the polygraph examination, and I didn't go any further with it.

Q Did you ever try to determine in your investigation whether there was an arrest of a man named Peter Dimento and one other, on Oakpoint Avenue, Hunts Point in the Bronx, where one kilo was seized.

MR. SAGOR: Objection, your Honor. Leuci has testified there was an arrest. These are arrests.

MR. DERSHOWITZ: At the point that this investigation was occurring, he hadn't so testified and --

MR. SAGOR: That he participated in an arrest.

THE COURT: Go ahead.

Q Did you ever conduct an investigation to determine whether or not such a seizure occurred?

A Counselor, I have told you that after the polygraph examination, I did not additional inquiry.

Q Before the polygraph, did you make such investi-

gation?

A No, sir.

Q Did you ever make an investigation to determine whether or not the amount of drugs seized in the arrest were logged with the Property Clerk's Office?

A No, sir, I didn't.

Q Is it fair to say that you did not make any investigations to corroborate the fact that any of these alleged arrests occurred, that the amounts of drugs stated therein were seized and were logged with the Property Clerk's Office?

A Well, first of all, Counselor, it is not my job to investigate the Police Department. I had certain facts that I was working on, I could not corroborate a certain set of facts, I requested Mr. Lawrence to take a polygraph examination which he voluntarily submitted to do. He failed that examination and I stopped the investigation.

Q Did you ever make any effort to corroborate whether any of those arrests occurred on the dates the Baron told you they occurred and whether the amounts of drugs the Baron told you were seized appear in any formal investigative reports of any police agency?

A Counselor, I have already told you, no, sir.

Q There is an allegation that says Larry thinks

Leuci was working for somebody named Tomatoes. I can't read that.

Can you read that for me?

A This says "Larry thinks Leuci was working for twenty months."

MR. SAGOR: I think that sums it up, your Honor, if I may.

Q On the page discussing John, in order to avoid confusing twenty months and Tomatoes again, could you read that entire page?

A The whole page?

Q It's only about six lines, five lines.

A "Chris was arrested one-and-a-half years ago. John paid $500 bail. Wong married to John's sister. Donald Wong, 40 Lakeshore Drive, Patterson, New York."

Q Did you ever go to --

A No, I didn't.

Q Can you let me finish the question. It says, under th e title of how to find John, that Wong was married to John's sister and then it has an address, Daniel Way, 40 Lakeshore Drive, Patterson, New York.

Did you ever go to 40 Lakeshore Drive, Patterson, New York?

A I talked to Barron about that and he said that

was no longer a good address and he was supposed to come up with a subsequent address.

Q Did you ever check to see whether or not the resident of 40 Lakeshore Drive, Patterson, New York, had left a forwarding address?

A No, sir.

Q Is that not the normal --

THE COURT: Is that normal police practice when the informant says it is not a working address, and would it be normal to check it out when the informant says he is going to come up with a current address?

THE WITNESS: I wouldn't, no, sir.

Q The next line says he was the representative for International Correspondence School in Scranton, Pennsylvania. Did you have any contact with the International Correspondence School in Scranton, Pennsylvania?

A No, sir. Before I got to that point we terminated the investigation.

Q You terminated the investigation before y ou inquired as to the place of business that was given to you?

A When a man fails a polygraph examination and tells me that he is lying on everything else, why should I believe anything else that's on that piece of paper.

Q You are saying you had matters you could have used to corroborate his story and you didn't do it solely

on the basis of a lie detector test?

MR. SAGOR: Objection, your Honor.

THE COURT: You may answer.

A That is not a fact, no, sir.

THE COURT: Let's not start the whole thing all over again.

THE WITNESS: Pardon me, sir.

THE COURT: I just forbid any repetition of what started perhaps an hour and a half ago.

Q Did the Baron give you a telephone number for the International Correspondence School where he said John was working, 914-279-3861?

MR. SAGOR: Isn't that Westchester, your Honor? Excuse me.

THE COURT: It was until this morning.

MR. SAGOR: Excuse me, your Honor. I haven't checked yet whether it is still 914 as of this afternoon.

Q Can you tell us what that telephone number is for?

A First of all, this is not where John works. This is where Donasld Wong works. None of this refers to John. This is how you can find John.

Now, Donald Wong works for International

Correspondence, not John.

Q Did you make a phone call for International Correspondence?

A I already told you,counselor, I concluded the investigation.

THE COURT: This is assuming the aspects of a parlor comedy.

Q Do you have any idea of this number, 914 --

A Counselor, I didn't check it out.

Q Do you have any idea what that number is?

A No, sir.

Q Is it possible that it is John's home number?

A According to what the Baron told me, it was the telephone number where Donald Wong works.

Q Did you ever call that number?

A No, sir.

Q Did you ever instruct anybody to call that number?

A No, sir, I didn't.

Q Did you do anything to try to locate the man who was married to John's sister?

A I have already told you, counselor, that I didn't.

MR. SAGOR: Excuse me, your Honor. Might

we avoid something? Is Mr. Dershowitz going to produce John at these proceedings? If not, then I -- excuse me, your Honor. Can we have that representation, whether John is going to be produced?

MR. DERSHOWITZ: About 60 seconds ago I first learned of the existence of a man named Wong. I never knew up until now Wong had been married to John's sister. It seems to me it is a very appropriate line of inquiry, when a government official has testified and an assistant U. S. attorney has testified there was an extensive investigation to inquire as to whether or not a telephone call was made to locate the brother-in-law of the subject who was the person who could have corrobotated all of Baron's allegations.

THE COURT: Put a question.

Q Do I take it then that you made no effort whatsoever to try to locate Wong even though you had very specific informationas to where he lived, worked and what his phone number was?

MR.SAGOR: Objection to the form of the question.

THE COURT: Sustained.

Q Did you make any efforts to locate Mr. Wong who you knew to be married to John's sister?

A No, sir.

THE COURT: Don't ask that again.

Q Did you tell Mr. Morvillo that you had information from the Baron that John's sister had a place where he worked and an address?

A I don't recall, counselor.

MR. DERSHOWITZ: I am sorry, your Honor may disagree, but it seems to me this is such a critical aspect of the adequacy of the examination, that we would like to recall Mr. Morvillo to put that one question to him if we can't get a clear answer --

MR. SAGOR: I will stipulate Mr. Morvillo, the subject of further checking for the moment, he doesn't know, he never heard of Mr. Wong and the Interantional Correspondence School from Scranton, Pennsylvania.

MR. DERSHOWITZ: We would prefer the government stipulate the opposite. This fellow --

THE COURT: Ask Mr. Morvillo the question and see what his answer is. Let's get along.

I don't share your view of the importance of this testimony. Go ahead.

MR. SAGOR: Your Honor, I think if I may suggest, Mr. Dershowitz call Mr. Morvillo. We may ask

the wrong question. I don't know how to phrase the question.

MR. DERSHOWITZ: That's fine.

Q Did Mr. Lawrence tell you about a person called the Saint?

A He could have. I don't recall.

Q Would it refresh your recollection to look at the last page of this memorandum and see references to the Saint?

THE COURT: I want to put some of my observations into the record at this point so that they are not lost and I do not forget them. I do not invite comment with respect to them.

This is a motion for a new trial based on the ground of newly discovered evidence. Newly discovered evidence in the motion papers relates to the affidavit of Mr. Lawrence and also to allegations of lying by Mr. Leuci at the trial. We have already explored from Mr. Leuci's mouth at the trial the nature and extent of his lying with respect to illegal conduct while he was a member of the Police Department. We are now involved in a discussion of whether or not there was a suppression, either deliberate or inadvertent, of evidence

which might tend to prove the defendant innocent. I think it important to define the issue at this point in these proceedings. It is not the function of a motion for a new trial, generally speaking, to inquire into the nature of the investigation conducted by the investigative agency as such, and I do not in so saying indicate that I express an opinion that the investigation here was inadequate. I do not express such an opinion.

We are here to determine, and it may be hard to remember this in light of what has gone on here for the last two days, we are here to determine whether or not the United States Attorney's Office was in possession of any information that would tend to prove Mr. Rosner's innocence.

One further thing. In considering, if one ever gets to the point of considering, the adequacy of the investigation, one must have in mind that we are talking about a long-time narcotics informer, not by any means the most reliable citizens of our community; we are talking about people who sell information, who make their living by selling information, and who one can almost take judicial notice of the fact are not necessarily addicted to the truth.

Now, I think that Mr. Sherman has indicated what

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he did, Mr. Morvillo has indicated what he did, and that's enough on that issue.

You may step down.

(Witness excused.)

MR. DERSHOWITZ: Your Honor, we would like to make an offer of proof at this point.

THE COURT: You may do so.

MR. DERSHOWITZ: The offer of proof is that the Baron specifically told Mr. Sherman about the man called the Saint. The man called the Saint plays a very large role in Mr. Lawrence's later allegation. The Saint is a person whose name is known both to the Baron and to Detective Leuci. Had the investigation gone forward and had Mr. Sherman asked Detective Leuci who the Saint was he would have been given a name and address and he would have been able to corroborate --

THE COURT: That's speculation. However, if the facts so demonstrate I will have Mr. Sherman recalled. But until there is some showing other than your statement I am not going to persist in what is increasingly turning into a filibuster.

MR. DERSHOWITZ: I have no idea how I can establish the fact without a witness on the stand.

THE COURT: I authorize you to talk to him

off the witness stand.

Tomorrow morning at 9 o'clock.

(Adjourned to July 3, 1974, at 9:00 a.m.)

WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
Robert Morvillo	261	328	330	
Nicholas Scoppetta	331			
Charles D. Sherman	365	387	400	
(Recalled)			420	
Patrick W. Fuller	407			

EXHIBIT INDEX

Government	Identification	In Evidence
2	248	250
3		250

UNITED STATES OF AMERICA

v.

EDMUND A. ROSHER

New York, July 3, 1974,

9:00 a.m.

Hearing resumed.

- -

THE COURT: Good morning.

Let me announce my rulings with respect to the remainder of that exhibit.

MR. JAFFE: Your Honor, may I just get the remainder out so I can follow you.

THE COURT: Yes.

Are you ready?

MR. JAFFE: Yes, your Honor.

THE COURT: Pages 61 and 62, starting on page 61 with IV(e). Delete the names from IV(e).

The remainder -- by the way, this deletion of names refers to all of my rulings in the light of what I said yesterday.

MR. JAFFE: I understand, your Honor.

THE COURT: 62, 63, 64 to but not including

III(b).

MR. JAFFE: Is that what we delete from, everything but --

THE COURT: No. You are going to give them everything up to page 64, the heading category III(b).

And starting 65, IV(j).

MR. JAFFE: Turn that over, Judge?

THE COURT: Yes.

Let me just see with respect to IV(j). Yes.

66, all of 66, 67, 68, 69, 74, all of that, eliminating the names.

On page 75 --

MR. JAFFE: Your Honor, may we -- the government updates 73. There is no objection as long as we delete the name beginning on 73.

THE COURT: Yes.

MR. JAFFE: Beginning with (e).

THE COURT: Yes.

Yes, I want you to eliminate the names.

The same with 74.

Page 75, eliminating the names except in paragraph numbered 4. And in 4 -- you know the names I am eliminating. I am eliminating the names of the

assistant district attorney involved and whatever, along those lines.

MR. JAFFE: With regard to 4, are we required to turn over that paragraph 4 on 75? Specifically the carry sentence that begins "Thereafter" and ends up on page 75?

THE COURT: No, strike that.

MR. JAFFE: Paragraph (f), deleting the names?

THE COURT: Yes, just a moment though.

Yes.

On page 77, under (g), all that you have to turn over there is 1, 3 and 6, eliminating the names.

MR. JAFFE: 1, 2 and 6, your Honor?

THE COURT: 1, 3 and 6.

So much for Exhibit 1B, which I herewith return to the government.

Somebody asked me with respect to the letter which I previously had sealed.

MR. DERSHOWITZ: Yes, your Honor.

THE COURT: I will require the Government to produce all of page 1 and only so much of page 2 as ends "however, we are making every attempt to investigate such allegations" which is in the first full paragraph of sub 3. I will pass this to you so that you know what I am talking about here.

All of page 1 and the first full paragraph of sub 3. The one that starts with the numeral 3 in front of it and that short paragraph.

MR. JAFFE: That's the end of it, Judge?

THE COURT: That's correct.

MR. JAFFE: Very well, your Honor.

THE COURT: All right, swear the witness, please.

MR. DERSHOWITZ: May I make one request.

I have a number of applications to make to your Honor --

THE COURT: I will hear them after this witness.

MR. DERSHOWITZ: Thank you.

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EDWARD M. SHAW called as a witness by the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q Good morning, Mr. Shaw.

Can you tell us when you first met Robert Leuci?

A In the early part of the year 1971. My best memory would be probably around the month of February or March of 1971.

Q When did You first learn that Mr. Leuci had committed several criminal acts?

A I left the U. S. Attorney's office to go to the Strike Force in July of 1962. I may have had some discussion with him about that before that, but I am not sure. However, I am sure that I heard from persons in the U. S. Attorney's office that at or after the time of filing of indictments in connection with his investigations, he had been questioned fully about those acts, so that I know that I was aware of it at that time.

During the course of the investigation there came a time when Leuci asked first Mr. Scoppetta to have returned to him a tape recording which he had made with Scoppetta prior to the time that Scoppetta came to the

U. S. Attorney's office and prior to the time that the investigation began, and in that connection I was told by Scoppetta and also had some conversation with Leuci about the fact that the tape recorded conversation made reference to some acts of misconduct while he was a police officer.

Q When that discussion about return of the tapes occurred, did you tell Mr. Scoppetta that it was your view that those tapes might constitute 3500 material?

A I don't know if I used those words. I am sure that I discussed with Mr. Scoppetta my concern that if we gave the tape back and it was I who finally made the decision that we would give it back, that Scoppetta would have to make a memorandum reflecting anything on those tapes that Leuci had said about his misconduct, that the memorandum would have to be typed and that it would have to be available and made available to any counsel in connection with any prosecutions that came out of it. I don't know that I discussed it with him in terms of 3500 material. It was obviously material that I was satisfied we would have to turn over to any counsel in connection with any prosecution.

Q Was it your advice at that time that the memorandum should contain the revelation of Leuci's crimes in as much detail as they were contained on the tapes themselves?

A I think in substance, that's accurate. I told Scoppetta he should listen to the tape recordings, that is, he should listen to the tape recordings in connection with the preparation of this memorandum and that the memorandum should reflect, in substance, what Leuci had said on the tapes about any prior misconduct.

Q Have you recently had an opportunity to review the Scoppetta memorandum?

A I looked at it five minutes ago, perhaps, for the first time after I saw it after it was prepared.

Q Would you read that and tell us whether in your view that memorandum does contain, in substance, the details of Mr. Leuci's admissions that were on tape?

MR. SAGOR: Objection, your Honor. Mr. Shaw has listened to the tapes.

THE COURT: Is that the fact?

THE WITNESS: That's the fact, sir. I don't even have to read it. I can't tell you by looking at it.

Q Was it your advice also, was it your decision also not to make a transcript of the tape recordings and

then preserve it for 3500 material, for disclosure to counsel, an exact transcript of Mr. Leuci's discussions of his crimes destroying all other aspects of the transcript?

A You mean saving whatever portion related to past misconduct?

Q Right.

A I cannot tell you that it was my decision not to do that. My best memory is I never considered it.

Q Did you ever have a discussion with Mr. Scoppetta or Mr. Leuci as to what Mr. Leuci said on the tapes about his criminal involvement?

A I'm sure I had a discussion with Mr. Scoppetta about that.

Q Do you recall Mr. Scoppetta telling you that Mr. Leuci described in detail one criminal transaction, naming names, giving locations?

A I don't recall that, no. In fact, I think my recollection is to the contrary. I think my best memory is I was told that the references to his acts of prior misconduct, as opposed to anything he may have said about other officers, were fairly brief, but I can't tell you for certain whether --

Q Did you --

MR. SAGOR: Let him finish.

A (Continuing) I can't tell you for certain whether I was told that in connection with Leuci's statements on the tapes about his prior misconduct, that he had mentioned other officers' names. I can't be certain about that.

Q Did you instruct Mr. Scoppetta to include in his memorandum the details of Leuci's criminality which appeared on the tapes?

A I think I have answered that, sir. I'm sure I told him that the memorandum should accurately reflect the substance of what Leuci had said about his own prior misconduct.

Q In light of what you knew about, what Leuci said on the tapes, did you regard the following statement as the substance of what Leuci said on the tapes:

"He stated further that he participated in some of these transactions as an intermediary between police officers and the targets of their investigations and shared in the proceeds on such occasions. He further stated that he never sold out any of his own wiretap investigations."?

A Yes.

Q Did Mr. Scoppetta ever tell you that Mr. Leuci

would have objected to a transcript being made of those tapes and to the part which related solely to his past criminality being preserved?

MR. SAGOR: Objection.

THE COURT: Sustained.

Q Did there come a time when you were present in your apartment when Leuci told a Mr. Tartaglino about sharing $200 seized with three other agents?

MR. SAGOR: May we have a time, your Honor? Objection.

MR. DERSHOWITZ: "Did there come a time" was the question.

THE COURT: Overruled.

A There came a time when Mr. Tartaglino was in my apartment. I think, although I am not positive, that was the first occasion that he had met Mr. Leuci, but I know that I was with them together and, as I say, my best memory is it was an introduction. I was not present, to the best of my memory. I can even be more positive than that. I was not present during any such discussion between Mr. Tartaglino and Leuci.

Q Did there come a time when you learned that Mr. Leuci had shared $200 seized with three other agents?

A There came a time I believe in the spring of '71, although I am not positive, when I was told by Leuci, and the context of how it came up I'm not certain of, that a specific agent of the BNDD -- and I don't know what the rules are here, sir, whether I should mention his name or not --

Q I am not asking for his name.

A -- a specific agent of the BNDD, who was in then in service with BNDD, now DEA, had received, I believe, $50 from some other agent on an occasion that had involved some kind of seizure or search warrant, an occasion when Leuci was present. I have a vivid memory of questioning Leuci quite extensively about the circumstances under which that agent had received the money in question because I was very concerned about his being an agent still on duty.

In the course of that conversation I think it is probable that Leuci either indicated to me that he himself had also gotten some portion of that, or that I assumed that he must have. I know I didn't examine him about that because at that time that was of no concern to me. I was concerned only about the agent then in

service. And I also know that at that time I had made a conscious judgment not to cross examine or inquire into Leuci's own possible prior misdeeds, the reason being that he was beginning the undertaking of a long undercover investigation and I didn't want to damage our relationship with by pushing him hard on things at that time.

Q Are you finished?

A Yes, sir.

Q When was it that Leuci told you about this incident?

A That's how our last question began. I believe it was probably in the spring or early summer, 1971, but I'm not positive.

Q Do you remember whether it was before or after the meeting in your apartment with Tartaglino?

A I'm not even certain of that, although I am certain that when Leuci told me this agent had received this money, I either directly myself or indirectly through Mr. Scoppetta or some other DEA agent made sure that Mr. Tartaglino was aware of that again for the reason that the incident involved a man then still in service, in a significant job.

Q Is it your best recollection now that you told

Mr. Scoppetta at some point about this incident?

A There is no question that Mr. Scoppetta and I discussed it because we were concerned about it. We were concerned about the fact that an agent in service, then in service, may have received that money.

Q Did you discuss with Mr. Scoppetta the fact that Leuci may have been involved in that transaction?

A I'm sure I didn't, for the same reasons as before. I didn't examine Leuci about that and I am not even certain that he told me that he had got some of it, although I think, as I have said before, it is highly probable either that he did or that in the context of what he said I clearly assumed that he must have. It was a situation involving a group of people, one of whom was Leuci, and I was certainly aware that the agent in question was not the only agent who had gotten a portion of that money. That was obvious from the description that was given to me by Leuci.

Q After the incident in your apartment with Mr. Tartaglino did Mr. Tartaglino discuss with you the incident herein described?

THE COURT: I am at a loss to understand this examination. As I understand the record as it now exists, the U. S. attorney admits he was in possession of

this before the time the case was tried. His position is twofold. His claim is his failure to turn it over was inadvertent rather than deliberate and, secondly, that it,compared to the other revealed examples of Leuci's illegal conduct at the trial,was de minimis.

Is that the government's position?

MR. SAGOR: Yes, your Honor.

THE COURT: Why are we going into this when the government concedes that it was in possession of the information and it takes the responsibility for that, claims that its failure to turn it over was inadvertent and claims that $50, alongside what Leuci testified to at the trial and three or four other instances, is de minimis.

MR. DERSHOWITZ: If the government would stipulate that the United States attorney was in possession of evidence of a felony under New York State law, that it did not turn it over to the defendant on the ground that it did not regard it as a sufficiently serious felony, we will ask no other questions along these lines.

MR. SAGOR: Your Honor, I will not stipulate to the speech. We conceded in the brief to give Professor Dershowitz an opportunity --

THE COURT: Let me see the extent of your concession. One, you do concede the government was in possession of this information before and during the trial.

MR. SAGOR: Yes, your Honor, to the extent that Mr. Shaw learned of it back in '71, and the DEA, not part of the U. S. Attorney's Office, did have the Goe memorandum --

THE COURT: The government did have the Goe memorandum.

MR. SAGOR: Yes, your Honor. Not the United States Attorney's Office, for what that's worth, and we think it is worth something in the court's consideration here. Yes, DEA did have the Goe memorandum, of course.

THE COURT: All right, and that was not turned over to the defense during trial.

MR. SAGOR: Itwas not.

THE COURT: What more do you want?

MR. DERSHOWITZ: I think perhaps three or four more questions will sharpen it.

Q Did there come a time when you were told by Mr. Leuci on the eve of the trial that he was considering not revealing the four incidents that he had told Mr. Scoppetta about?

A I don't know that I was told that directly by Mr. Leuci. I do have a clear memory that shortly before, and I am not precise on the timing, shortly before the Posner trial either from Mr. Morvillo or other people still working on this series of matters, I no longer being in the U. S. Attorney's Office, that there was some difficulty about Leuci owning up to the specific things which I had by that time understood that he had specifically told them about. I came over to the U. S. Attorney's Office and I had a conversation with Leuci at that time in one of the assistant's offices.

Q Before we get to the conversation, is it your best recollection that it was Mr. Morvillo who told you about this problem?

A No. I don't know who told me about it, and it's possible, although I wasn't seeing much at all of him at the time, it's possible that Leuci expressed some such concern to me, although I doubt that. I think it was someone in the U. S. Attorney's Office who was in the official corruption unit of the U. S. Attorney's Office or

involved in the preparation of that case. I don't favor Mr. Morvillo over anyone else.

Q Did you tell Mr. Leuci at that point that if he perjured himself at the Rosner trial and did not disclose all of the criminal incidents that he was involved in that he would be prosecuted for perjury?

A I don't know that I used that form of words. I know that I told him in the strongest possible terms that he had absolutely no choice but to be candid in court about his own prior misconduct, whatever that was.

Q Did you tell him in words or substance that you would no longer be his friend if he testified in anything other than a fully candid way about his own criminal involvement?

A I don't think I ever said that in words or substsnce.

Q Did you tell him that if he testified falsely and did not state his criminal record at his trial that you would surely know about it?

A I doubt very much if I said that in substance, but that was obvious. I may have said that. I was right across the street still working for the government. I have no memory of saying that. That thought may have been part of the conversation.

Q Did you tell him in words or substance explicitly or implicitly that you would be following the Rosner trial?

A Well, I'm sure, sir, that I didn't use that as any kind of lever or anything in terms of making it clear to him that he had to tell the truth, but that was certainly obvious that I would be following it. I was interested in it. I had been involved in the investigation and I may well have indicated to him that I would be, but I don't have any memory of that. It's perfectly possible.

Q Did there come a time when you became aware that a new trial motion was brought in behalf of Mr. Rosner in January of 1973?

A I must have been aware of that, sir. I couldn't fix it at any time, but I'm sure I was aware of that.

Q And were you aware that the basis of the new trial motion was an attempt to establish that Mr. Leuci had not been wholly candid and complete in describing his own criminal involvement?

A I'm going to have to ask you a question, if I may, sir. Is what's going on now a second new trial motion?

Q Yes.

A I'm pretty sure that at whatever point I heard of a new trial motion I was aware that it was coupled -- that it had as its substance, or at least part of its substance, some allegations about Leuci's conduct. I am quite sure about that. I don't think there is any doubt about that.

MR. DERSHOWITZ: May I have one minute, your Honor.

THE COURT: Yes.

MR. DERSHOWITZ: We have no further questions of this witness, your Honor.

MR. SAGOR: The government has no further questions.

THE COURT: You may step down.

(Witness excused.)

THE COURT: Make your motions.

MR. DERSHOWITZ: Your Honor, this is going to be a series of applications which I hope I can take about three or four minutes to put into some kind of context. The entire day yesterday was devoted to exploring the degree or thoroughness of the investigation conducted of the Baron's allegations against Leuci in the Morvillo-Sherman investigation. Both Morvillo and Sherman testified that the investigation was thorough and

and they were unable to corroborate the vague generalities given to them by the Baron. The thrust of yesterday's testimony until near the very end was that the Baron had supplied them with but one name of a person who had participated in drug transactions with Leuci, that this one name was John, that a thorough attempt was made to locate John and that it failed.

After the cross examination of Sherman and over the opposition of the government defendant finally got to see Sherman's handwritten notes of the investigation. These notes contain two items of information completely inconsistent with and derogatory of the testimony of both Morvillo and Sherman in defendant's view. These notes establish that the Baron gave Sherman at least one other name, the Saint, of a person who had allegedly had drug dealings directly with Robert Leuci, that the Baron specifically told Sherman how to locate the Saint by simply picking up the telephone and calling Assistant District Attorney Hershey who, the Baron told Sherman, knew who the Saint was, and that Sherman never made any attempt to locate this person who allegedly had bought heroin from Leuci and had sold heroin for Leuci.

Moreover, the notes reveal that the Baron told Sherman how to find John. Under a heading in

Sherman's own handwriting, which reads "How to find John," four separate leads are given, including the name, place of employment, former address and possible telephone number of John's brother-in-law, none of which Sherman followed up in any way.

This evidence which the government has now stipulated to and which will formally move for admission into evidence is critical in defendant's view in helping to establish the unthoroughness of the Morvillo-Sherman investigation.

The important point, with all due respect, is that the government resisted turning this critical evidence over to us and we must assume, and I do assume in all good faith. Equally significant -- and here, your Honor, I make the argument with all due respect to the court -- this court as well quickly perused the document, and in its quick perusal, and again very understandably, found nothing of significance in it. I took the adversary eye of the defense team, those most interested in destroying the credibility of the government's case, to discern the critical significance to the defense of certain obscure scribblings in Mr. Sherman's notes. This we respectfully submit is the best evidence of why the process by which the judge inspects documents in camera is not a satisfactory one.

THE COURT: Now that you have made that speech, what is it you want me to do?

MR. DERSHOWITZ: I was just coming to that.

THE COURT: Well, that's great.

MR. DERSHOWITZ: We submit the eye of the adversary counsel could find significant evidence equally damaging in the files which your Honor has perused and we ask that these files, including the entire investigatory file of Mr. Sherman be turned over to counsel for their investigation.

THE COURT: Denied.

MR. DERSHOWITZ: We also move to enter into evidence the following stipulation agreed to by counsel for the Government and counsel for the defense yesterday evening.

Charles Sherman, if called --

MR. SAGOR: Don't read it. Mark it and put it in evidence.

THE COURT: Hand it up.

MR. SAGOR: Make it Government Exhibit 9.

We have no objection to it being offered in evidence.

(Government's Exhibit 9 was marked for identification.)

x

MR. SAGOR: When Mr. Dershowitz is finished --

MR. DERSHOWITZ: I have a number of other applications to make.

MR. SAGOR: May I make a comment now?

THE COURT: Yes.

MR. SAGOR: I think it was outrageous, although Mr. Dershowitz did not accuse the Government with respect to bad faith, I must say it is the Government's belief that his statement has to be made in bad faith.

Your Honor, as I understand the testimony, John was given as the only intermediary between Leuci and the Baron, which is not to say, and the important intermediary -- his was the important name. Mr. Sherman has a one-line squiggle that allegedly the Saint dealt with Leucy but John was the intermediary, John was the only intermediary. Apparently the Saint is another name but apparently in a different context, allegedly giving drugs to Mr. Baron.

Mr. Morvillo never testified that he had been told anyhthing about the Saint. There is no apparent inconsistency with Mr. Morvillo's testimony that Mr. Sherman told him about this principal character John. There is a one parenthetical footnote to this guy, the Saint. It seems to me that is just getting into something so inconsequential, so insubstantial that I am absolutely

amazed, shocked and somewhat emotional over this speech that Mr. Dershowitz must have spent a long time in preparing last night. At all times Mr. Sherman, contrary to any expectation on my part, had agreed to be interviewed by them. I don't know if they ever asked to see his notes. I showed him the notes here. He had every opportunity to interview the other agents and I believe that as a practical matter.

Indeed, he has all the exhibits that was in Mr. Sherman's investigative file anyways.

THE COURT: What is your next application?

MR. DERSHOWITZ: May the record reflect -- rather than being a one-line squiggle or footnote, the reference to the Saint is at least as long as the reference to John.

THE COURT: I don't want a continuation of this discussion.

What is your next application?

MR. DERSHOWITZ: My next application is that we seek to admit into evidence the full notes, handwritten notes which we received yesterday from Mr. Sherman.

MR. SAGOR: I have no objection.

THE COURT: Received.

MR. SAGOR: This is a Government exhibit.

I have no objection. It is on the back, Mr. Clerk.

(Government's Exhibit 6 was received in evidence.)

MR. DERSHOWITZ: As a result of papers disclosed to us, we discovered another very significant matter, that the car which the Government says was paid for by check on September 22, 1971, that Mr. Leuci paid for by check on September 22, 1971, we have a document indicating that that very car had not yet even been sold to the Baron or his wife by that date. That in fact the date of sale --

THE COURT: Please, just a moment. That is not an application. You have your opportunity to call witnesses and prove these things. That is the way it is done. I don't want to hear a speech about it. Call the appropriate witness and prove it.

MR. DERSHOWITZ: We are seeking to admit into evidence --

THE COURT: You are offering something in evidence?

MR. DERSHOWITZ: Yes.

THE COURT: Show it to your adversary.

MR. SAGOR: There is a witness out there that can explain the cars. We have another document here.

Why are we -- I have no objection to this document if it is established properly through a Government witness. I assume the Government gave it to you, is that correct?

MR. DERSHOWITZ: Yes.

MR. SAGOR: Call the witness.

THE COURT: Do I understand, Professor Dershowitz, that the Government gave you that document?

MR. DERSHOWITZ: I just said as a prelude to my speech -- to my argument, that the Government had turned this over to us and we had discovered very significantly therein a conflict between the testimony on the witness stand and this very document.

THE COURT: Objection sustained. No sufficient foundation.

What else?

MR. DERSHOWITZ: We were hoping not to have to call this witness -

THE COURT: I am not interested in hearing what you were hoping to do. This is a Court of law. Things are established by the calling of witnesses and the introduction of exhibits. Thawt's the way it is done, Professor.

MR. DERSHOWITZ: I think your Honor asked us yesterday if we could stipulate to as much as possible --

THE COURT: What is your next application, please?

MR. DERSHOWITZ: We would also like to formally state for the record that we submitted a subpoena on Mr. Mahoney, the lie detector expert, and have been told that Mr. Mahoney is unavailable because of illness and will not be able to appear in court. We would simply like the record to so reflect.

THE COURT: Yes.

MR. DERSHOWITZ: I think we have no further application at this point and we would like to call Mr. Wolf as our next witness.

THE COURT: Mr. who? Mr. Wolf?

MR. DERSHOWITZ: We have one problem of time, which I hope will pose no problem. Mr. Wolf should be the next witness in sequence. We have a witness, Mr. Kaufman, who has an obligation at 10.30. Can we call him and quickly put him on the witness stand?

MR. SAGOR: Your Honor, I believe this is a polygraph expert. Are you going to accept polygraph testimony? I assume he will look at the polygraph material. If he is, we have other documents coming, I would like to extensively cross-examine him based on other in-part lie detector tests by the Baron to show the validity of the

Mahoney test. I just learned about Mr. Kaufman late last evening.

THE COURT: I learned about the possibility of such witnesses from the New York Times this morning.

MR. SAGOR: I haven't seen such -- I didn't take the article seriously until I saw in fact a lie detector expert. I would like --the Government's application is that Mr. Kaufman not be taken out of order so I have time to cross-examine him. Unless I would like to -- otherwise I will have to call him back. But I prefer to do it in order.

THE COURT: Let's take Mr. Wolf.

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WILLIAM J. WOLF, JR., called as a witness by the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q Good morning, Mr. Wolf.

Did there come a time when you were asked to conduct an investigation along with Mr. Sherman relating to certain car transfers allegedly made by one Richard Lawrence to Detective Leuci?

A Yes, I did.

Q In your investigation did you come up with a bill of sale from Manor Lincoln-Mercury, Incorporated, of which this is a true copy?

A Yes.

MR. DERSHOWITZ: May we move to admit this into evidence.

MR. SAGOR: I have no objection.

THE COURT: Received.

(Defendant's Exhibit C was received in evidence.)

Q Did there come a time during your investigation when you discovered an application for registration by one Regina Leuci dated in June of 1972?

A Yes.

MR. DERSHOWITZ: Move to admit this into evidence.

THE COURT: Mr. Sagor.

MR. SAGOR: What is the -- can we have that as showing the connection between the two cars? There is a serial number. Can I see that?

I have no objection.

THE COURT: Received.

(Defendant's Exhibit D was received in evidence.)

xx MR. DERSHOWITZ: We have no further questions of this witness, your Honor.

CROSS EXAMINATION

XX BY MR. SAGOR:

Q Mr. Wolf, when you got the document --

THE COURT: Let me see those documents.

All right.

Q Mr. Wolf, I show you Government's Exhibits C and D in evidence.

Can you identify those two documents, those two documents that you turned over to Mr. Dershowitz' assistant, Miss Baker, last evening?

A Yes, I can.

Q Was that pursuant to my direction?

A Yes, it was.

Q And those documents relate to a Ford vehicle, is that correct?

A Yes, that is true.

Q And what is the vehicle identification number?

A 6E72C276503.

Q I show you what is now being marked Government's Exhibit 10.

MR. DERSHOWITZ: Can we see that?

MR. SEGOR: Certainly.

(Government's Exhibit 10 was marked for identification.)

MR. DERSHOWITZ: Your Hono r, at this time this is not being admitted into evidence, I take it.

THE COURT: It is marked for identification. It hasn't been offered yet.

MR. SAGOR: Your Honor, while Mr. Dershowitz is looking at it, perhaps he will acknowledge for the record he also received a copy of Government's Exhibit 10 for identification.

Would you so acknowledge?

MR. DERSHOWITZ: Is this the document?

MR. SAGOR: Yes, it is, Mr. Dershowitz.

MR. DERSHOWITZ: Yes, we received a copy.

Q Would you identify Exhibit 10 for identification as another document you received in the course of your investigation?

A Yes.

Q Does that document relate to Defendant's Exhibit C and D in evidence?

A Yes, it does.

Q Is that the same car we are talking about?

A Yes, it is.

Q Do you see a date of transfer, date of transaction on that document?

A I do.

Q Would you tell us what date it is, directing your attention to the bottom right-hand corner of the document?

MR. DERSHOWITZ: Objection, your Honor. There is no statement in that document talking about a date of transfer that I can see.

Q Date of purchase.

A Date of purchase, as stated here, 8/21/71 -- excuse me, 8/20/71.

Q August 20, 1971, is that correct?

A It is.

Q Would you tell us the date of the check?

A September 22nd, 1971.

Q Is that, according to my arithmetic, eight days later, ten days, whatever it is -- forget it.

A That was about a month.

MR. DERSHOWITZ: Did he say that's about right?

THE WITNESS: No, I said about a month.

Q Mr. Wolf, just one more question:

In connection with the investigation conducted, the Baron made reference to some store in Brooklyn; is that correct?

MR. DERSHOWITZ: Your Honor, excuse me, this is not proper cross-examination.

THE COURT: I will permit it.

Q Is that correct?

A Yes.

Q And what address did the Baron say, according to the investigative material you have as the address in Brooklyn where the store was of some relevance?

A I do not recall specifically. I know --

Q I will show you the document.

MR. SAGOR: May I have just one moment, your Honor, we will clear it up in a second.

THE COURT: Yes.

MR. SAGOR: Mr. Dershowitz, I believe you have a map or something, a Government exhibit for identification.

MR. DERSHOWITZ: I thought you had taken it back.

MR. SAGOR: Excuse me, one moment longer.

May this be marked Government Exhibit 11 for identification.

(Government's Exhibit 11 was marked for identification.)

Q Mr. Wolf, would you look at Government's Exhibit 11 for identification and see if that refreshes your recollection as to the alleged location of the store in Brooklyn?

A Yes. It was in the vicinity of Eastern Parkway and Utica, I believe Avenue.

Q Is that document Eastern Parkway, PKY, as opposed to Eastern Avenue?

A Yes.

Q Was any such store located that the Baron had given information on?

A No, it wasn't.

MR. SAGOR: No further questions.

REDIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q Mr. Wolf, referring to the document which the Government has marked, could you read for us on that document the name of the last registrant, the registrant who lives at 345 Upland Avenue, Yonkers, New York?

MR. SAGOR: Excuse me, the document is in evi-

dence, your Honor. Unless this is prefatory to some question, I think it's a waste of time to read it.

THE COURT: Professor Dershowitz, you can read it and --

MR. DERSHOWITZ: I can't read it. That's the point. It's not deciperable.

A From this copy, I can't read it either.

Q Do you have an original in your possession?

A Yes.

Q May we see the original?

MR. SAGOR: I have no objection, of course, to the substitution of the original.

THE COURT: The original will be substituted.

Q I take it this is an original Xerox?

A This is what the Motor Vehicle Bureau presented.

Q May I please look at it?

A Yes.

(Handed.)

Q Try your best and see if you can decipher it from the original.

A I can make out a few letters but I can't make out the name.

Q You cannot make out the name of the person?

A No.

Q Can you make out the date on which this particular document was executed? I am asking you what date this particular document was executed on.

A I can make out a date where it says:

"Sworn to before me this 12th day of 4/72."

I assume that's a notary --

Q I am asking you if you can tell from this document on what date this document was executed?

MR. SAGOR: Are you talking about 10 in evidence, Mr. Dershowitz?

MR. DERSHOWITZ: I am talking about this item which I assume is Exhibit 10.

MR. SAGOR: Let's put it in evidence.

MR. DERSHOWITZ: I can do it the way --

MR. SAGOR: Your Honor, I --

THE COURT: Has 10 been received in evidence?

MR. SAGOR: Yes, your Honor.

May this be substituted?

MR. DERSHOWITZ: I don't think it has been received.

MR. SAGOR: I have offered it.

MR. DERSHOWITZ: I oppose it on the ground it is not desirable. We should get the original document from the Motor Vehicle Bureau. Mr. Wolf cannot read it.

THE COURT: Received.

(Government's Exhibit 10 was received in evidence.)

Q Can you, upon inspecting this document which has now been admitted into evidence, tell us what date it was executed on?

A I can read the date that is here. I'm not certain that that is considered the date it was executed on.

Q Would you read the date and read what comes before and after the date?

A "The undersigned duly sworn says I have purchased the vehicle described --"

Q I am asking you to read at the bottom over here, "Sworn to before me this day of".

A "This 12th day of 4/72." That would be April.

Q In your report to Mr. Sherman, on what day did you tell him that your investigation had disclosed the car had been transferred?

MR. SAGOR: To whom, when?

Q To Mr. Leuci from Audrey Monroe.

I am asking you to remember what you told Mr. Sherman on the basis of your investigation, the date of transfer had been?

MR. SAGOR: Objection, your Honor. Based upon what, the revised billing, on what?

THE COURT: Overruled.

MR. SAGOR: The document speaks for itself, your Honor.

THE COURT: Overruled.

A I have no idea what day it was.

Q Did you ever ask Richard Lawrence whether the car had been transferred on 8/20/1971, or subsequent to October 28, 1971?

A No, I did not.

MR. DERSHOWITZ: No further questions.

MR. SAGOR: I have no further questions.

THE COURT: You may step down, sir.

(Witness excused.)

MR. SAGOR: May I have my documents back, please?

MR. DERSHOWITZ: This was admitted into evidence and this was the original to be substituted, and these have been admitted into evidence by the defense and these are my documents.

MR. SAGOR: You can keep your defense documents.

Mr. Clerk, may this be marked Government's Exhibit 10 for identification. I want to substitute

hps

the original Xerox.

MR. DERSHOWITZ: I want it understood these documents have been admitted into evidence, not for identification.

THE COURT: The record will disclose what the record will disclose. Anything that has been presented for rulings, I have ruled upon.

MR. SAGOR: Your Honor, may Government Exhibit 10 now marked in evidence be substituted for Government's Exhibit 10 in evidence?

THE COURT: Yes.

MR. DERSHOWITZ: I would like to call Mr. Kaufman.

MR. SAGOR: Your Honor, I object to that until certain documents are received. The Government asks this witness be taken later.

MR. DERSHOWITZ: It seems to me, we have a right to present the witnesses as we choose.

THE COURT: I will decide that.

What is the problem?

MR. SAGOR: Your Honor, I had no idea a polygraph expert, until yesterday, will be called. I am waiting to receive other polygraph examinations of Mr. Lawrence to have the expert look at, if your Honor is going to have a

battle of the experts on polygraph. There is no basis of having an expert come in here and look at Mr. Mahoney's tests.

THE COURT: I am going to permit Mr. Dershowitz to make his record on this subject, although I must say that it does not closely bear upon the question I must decide as I see that question. Nonetheless, the Court of Appeals may see some virtue in it if the matter gets that far.

MR. SAGOR: The application of the Government may be, and maybe Mr. Dershowitz may consider that, the witness may remain here subject to further cross-examination and --

THE COURT: Yes. I will direct the witness to remain here.

MR. SAGOR: Then he may want to keep him to do it all at once. The witness has to go away, as I understand it, for some reason and my documents will be here by 12 o'clock. He may well want to call him at once.

MR. DERSHOWITZ: Your Honor, we only have a few more witnesses to go. I suspect we may be finished with our presentation before lunch and if we --

THE COURT: How many witnesses do you have?

MR. SAGOR: It depends, your Honor, if Mr. Dershowitz calls the Baron as a witness, that is. I don't

think any witnesses if he doesn't call the Baron, barring unforeseen circumstances.

THE COURT: It is your case, Mr. Dershowitz. I will require Mr. Kaufman to be here until such time the documents get here Call whomever you like. I just want the record to indicate the reason for my statement as to the materiality of this. The question is not really, not really whether or not the lie detector tests were done properly. The question is really, if there is one, and I shall deal with this in any opinion I write or may read into the record later, the question really has to do, even assuming your view of the facts, with whether the Government undertook an investigation, completed an investigation and acted on the investigation. That's all. I really don't see it terribly important if some polygraph reader read the thing wrong as bearing upon whether the Government discharged whatever obligation it may have had. That was the reason for the remark I have made, but you may call the next witness.

MR. DERSHOWITZ: I will call Mr. Kaufman, please. One preliminary application, your Honor.

We have been anxiously trying to interview a witness named Agiuluz and we --

THE COURT: Who is Mr. Agiuluz?

MR. DERSHOWITZ: He is the man who apparently told the Government about the information which led to the Leuci recantations. The Government has told us Mr. Agiuluz is willing to be interviewed. Charging no bad faith at all, on several occasions we have been at an appointed place to meet Mr. Agiuluz and he has not shown up and --

MR. JAFFE: Your Honor, Mr. Agiuluz was in Mr. Giuliani's office yesterday at 1 o'clock and Mr. Dershowitz was not there. Thereafter, the marshals took him to a hospital. At Mr. Dershowitz' request last night, Mr. Giuliani called the marshals to ask them to have him here at 8.15 this morning. They did not produce him. They are not at our direction, the marshals, and --

THE COURT: They are not even under my direction.

MR. JAFFE: Mr.Agiuluz was in Mr. Giuliani's office at 1 o'clock yesterday. Mr. Dershowitz was not there.

THE COURT: I take it the marshal was asked to bring him down to court this morning, to the U. S. Attorney's office, that is?

MR. JAFFE: To Mr. Giuliani's office at 8:15.

THE COURT: I can't say it's altogether unusual that a person in custody has not been delivered here on time. In any event, make him available.

MR. DERSHOWITZ: It is extremely unfortunate the U. S. Attorney's Office --

THE COURT: Let's proceed. Call the next witness.

MR. DERSHOWITZ: Mr. Kaufman.

MR. JAFFE: Judge, while he is coming in I would like to turn over to defense counsel the redacted copy of what we have marked now Exhibit 8 for identification.

V I C T O R K A U F M A N, called as a witness by the defendant, being first dulysworn, testified as follows.

THE COURT: There is a document of files which I have not had the opportunity to read and I will read that

file.

MR. JAFFE: I will go down as soon as Mr. Kaufman is done and make them available within a half an hour.

MR. DERSHOWITZ: I didn't hear that.

THE COURT: He said with respect to the rules I made this morning at such time as we stop he will have copies for you within a half an hour.

DIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q Good morning, Mr. Kaufman. Can you tell us what your credentials are as an expert on the polygraph?

A Well, I'm a charter member of the American Polygraph Association. I'm former president of the Polygraph Examiners of New York State. I learned the operation of the polygraph instrument in the New York City Police Department, where I was a lieutenant in charge of the Homicide Squad in Brooklyn. I have conducted more than 10,000 polygraph examinations in the last 15 years for business, industry, defense counsel, prosecutors.

I am chairman of the Awards Committee of the American Polygraph Association, and I have attended every seminar, with the exception of two, within the last 15

years. These seminars are usually under the auspices of some college or university, and are truly working seminars in the practice of lie detection.

MR. DERSHOWITZ: Without objection from the government may I simply submit a more extensive list of Mr. Kaufman's qualifications?

THE COURT: Yes.

Q Did there come a time when you were shown charts of a polygraph examination conducted on one Richard Lawrence by True Security?

A There was.

Q Can you tell us whether you examined those charts?

A Yes, I did.

Q Were you also shown the questions that were asked of Mr. Lawrence on the lie detector test?

A Yes, sir.

Q On the basis of your expertise in polygraph examinations did you reach a conclusion as to whether or not Mr. Lawrence showed sufficient stress so that it could be concluded that he was engaged in deception?

MR. SAGOR: Objection. Absolutely no foundation. There is no foundation, one. The questions are not properly put to get expert testimony.

That is for starters.

Secondly, your Honor understands we have a more fundamental objection to this material.

THE COURT: What is the more fundamental objection?

MR. SAGOR: The validity of the lie detector test on this examination. We didn't offer the Mahoney examination for the truth of that and we --

THE COURT: I have indicated my views about that already. I am going to permit him to make his record. As I said, I don't regard this of great significance. However, I want the record to be com plete and I want Professor Dershowitz to put it in the record knowing what my views are about it for the reasons I have stated.

Now let me ask you something preliminarily. Is it it possible for you to come to an opinion in a matter of this kind without having been present at the time the questions were asked?

THE WITNESS: I believe in this case, yes, because if the examiner relied solely on the charts, the charts were insufficient to indicate deception.

THE COURT: Generally speaking, would you say that just from looking at a series of questions in the

chart you could form an opinion as to whether or not the polygraph readings taken were proper?

THE WITNESS: I think generally, yes.

THE COURT: Generally speaking, preceding an examination of this kind it is the technique, is it not, that the subject be in effect briefed by the polygraph operator, the questions going to be asked are generally put, he responds to them?

THE WITNESS: That's correct.

THE COURT: And after that has been done the man is hooked up to the machine -- that's about the best way I can think of putting it -- is that correct?

THE WITNESS: That's correct.

THE COURT: And the questions are then put to him and the needles make the recordings that they are going to make?

THE WITNESS: Yes, sir.

THE COURT: Does it affect your opinion at all, the proceedings previous to the actual taking of the polygraph examination affect your opinion?

THE WITNESS: Your Honor, I don'tthink in this type of examination it would affect my opinion. If it were a chart that was irregular or possibly deceptive you might stimulate an individual by shouting at him or

causing him to react, but these charts are the opposite; they are rather flat.

THE COURT: I will permit the examination to go forward.

BY MR. DERSHOWITZ:

Q Putting the question a little bit differently: if the charts were to show extreme variations, might it not be true that you would have to have further information before you could confirm the fact that the subject was lying?

A I believe so. It would be more difficult.

Q But if the charts were relatively flat, you would need little or no further information to indicate that the records didn't show evidence that he was in fact lying?

A That's correct.

Q You have had an opportunity to examine, in some detail, these charts?

A I did.

Q On the basis of your expertise in this area, would you tell us what conclusions could be drawn, reasonably drawn, by an expert from these charts?

THE COURT: Why don't you put the charts before him.

MR. DERSHOWITZ: He has had an opportunity to examine them in detail. If you would like to look at them again --

MR. SAGOR: May we have them marked?

MR. DERSHOWITZ: We would like to admit them in evidence.

THE COURT: They are now offered.

MR. SAGOR: I object to their being received for the truth.

THE COURT: Received.

(Defendant's Exhibit E was received in evidence.)

BY MR. DERSHOWITZ:

Q Refreshing your recollection by the charts or whatever material there is in this document, can you tell us what conclusions an expert could reasonably draw from these charts?

A I have examined these charts extensively. May I put it in this manner. I do not believe you can draw a conclusion of deception on the basis of these charts.

MR. DERSHOWITZ: No further questions, your Honor.

CROSS EXAMINATION

BY MR. SAGOR:

Q Mr. Kaufman, your business addresses is located where?

17 Battery Place.

Q Are you in private practice or do you have a business?

A I'm in private practice.

Q Does your business have a name or is it just --

A Well, it's the New York Lie Detection Division of the Sentor Security Group.

Q Did you make any effort to contact Mr. Mahoney to discuss with him what, in addition to the charts, he relied on in connection with his report?

A No, sir.

Q Were you told in any way that Mr. Mahoney was unable to speak to you so you could find out what his procedures were?

A No, sir.

Q Is it fair to say that in addition to charts, a polygraph operator makes a determination from the physical appearance and demeanor of the subject?

A I think that's part of the examination, yes, sir.

Q Would it be fair to say that it would be an important conclusion on his part to see the particular subject, is that correct?

A On the basis of what I said before, I don't believe it's that important. But may I add this: I was only asked to read the charts and give my opinion of the charts.

Q Isn't it fair to say that one cannot give a full opinion as to the validity of charts without seeing the subject involved?

A No, I don't believe so. Not in this case.

Q Is it your case as an expert that where charts are relatively flat that from the charts alone you can't conclude a reasonable polygraph conclusion?

A I think that's basically -- no, no. You can't conclude that they are deceptive. You might say they are not conclusive, but on the basis of these charts, and that's all I was asked to look at, you cannot conclude that they are deceptive charts.

Q Isn't it fair to say though that an examiner who had, in addition to the charts, the subject before him for examination might well be able to conclude, based upon his physical examination of the subject in addition to the charts, a reasonable conclusion of deception?

Isn't that fair to say? Yes or no, Mr. Kaufman.

MR. DERSHOWITZ: Could the witness be allowed to --

THE COURT: Will you read the question.

(Question read.)

THE COURT: You can answer that question yes or no, and if Mr. Dershowitz wants to extend it he may do so. Yes or no.

MR. DERSHOWITZ: Yes or no if he can answer yes or no.

A Yes.

THE COURT: He has answered yes.

THE WITNESS: That's reasonably close.

Q Given the fact Mr. Mahoney had before him the subject it is possible with the charts and Mr. Baron before him he could have well reasonably concluded that the Baron was being deceptive, isn't that correct?

A I don't believe so.

Q You just said, Mr. Kaufman, if I understand you correctly, that notwithstanding the fact that charts may be flat, it is possible to have, when we have the subject before you, a reasonable conclusion based upon all factors that a man is being deceptive?

A You didn't allow me to answer the question.

THE COURT: Make whatever answer you want.

A May I do this. This conclusion would be a detective's conclusion from observing an individual. It would not be a polygrapher's conclusion. The polygrapher's conclusion must be based primarily on the charts and the charts do not indicate deception.

THE COURT: When you say primarily, what other matters are considered?

THE WITNESS: Possibly the individual's physical reactions, but to a very small degree.

Q Are you saying, Mr. Kaufman, that given these charts, no polygrapher, whatever the circumstances of having Lawrence before them, could conclude that he was being deceptive? I don't think you are saying that, are you?

A I couldn't say that because Mr. Mahoney said the opposite.

Q If I understand you correctly, you are saying

you cannot tell -- clearly you are not saying that Lawrence told the truth looking at these charts alone?

A No, no.

Q By the way, who asked you to conduct your examination based on the charts alone?

A I am sorry. I forget the gentleman's name, but this gentleman over here.

THE COURT: Indicating Mr. Rosner.

Q When did Mr. Rosner ask you to look at these charts?

A It was a few days ago.

Q Can you tell us the exact date?

A Thursday, June 27th.

Q Thursday, June 27th?

A That is correct.

Q Had you been contacted prior to Thursday, June 27th, in connection with the possibility that you were to make a polygraph examination?

A I don't believe so. My recollection is that it was Thursday, June 27th.

Q What time, Mr. Kaufman, that you were first contacted?

A I have no recollection of the time.

Q In the morning or the afternoon.

A I have no idea of that.

Q And what happened, who called you on the telephone in connection with the examination?

A I believe it was Mr. Rosner.

Q What did he say to you?

A He asked me to come down and evaluate some charts.

Q And you went down to his office, is that correct?

A That's correct.

Q 401 Broadway?

A That's correct.

Q And you were shown the exhibit that you have before you, Defendant's Exhibit E in evidence?

A Yes, sir.

Q Did Mr. Rosner indicate to you that Mr. Mahoney was available for you to call in any way?

MR. DERSHOWITZ: Objection, your Honor. No foundation has been laid for that. Indeed, the government knows Mr. Mahoney is sick in bed.

THE COURT: Overruled.

A He did not tell me about Mr. Mahoney's availability.

Q When you had been asked to do examinations of

other people's polygraph examination -- have you ever been asked, by the way?

A Yes.

Q Isn't it fair to say that under such circumstances you would usually speak to the prior examiner to get other additional records, such as any recordings that may have been made in connection with the examination?

A I frequently do, but not always.

Q Can you tell us why you did not in this case, which would have been the practice of the American Polygraph Association, the recommended practice?

MR. DERSHOWITZ: Objection, your Honor. No foundation has been laid for that.

THE COURT: Sustained.

Q Isn't that true?

A I don't believe so. I don't know that to be the practice.

Q Are you saying it is not a recommended procedure of the American Polygraph Association to get material from a prior examiner when you are asked to give an examination of his prior finding?

A I don't recall it to be a procedure of the American Polygraph Association. We frequently do it and sometimes we don't. I don't think it is a must.

MR. DERSHOWITA: May the record reflect we asked this government to turn over all the relevant documents and we turned over to this witness all the relevant documents that the government turned over to us. This line of examination is absolutely improper in light of that turnover.

THE COURT: Overruled.

Q Mr. Kaufman, do you recognize Mr. Richard Arthur as a recognized polygraph expert?

A I do.

Q Were you told that Mr. Arthur previously examined Mr. Richard Lawrence and found him to be deceptive in connection with a lie detector test?

A No, sir.

Q Doyou recognize a Louis A. Palau, a polygraph examiner, formerly president --

MR. DERSHOWITZ: I object. These people were not consulted in reference to this case.

THE COURT: Overruled.

Q -- who is with the New York City Police Department?

A I know Mr. Palau.

Q Do you recognize him as a recognized polygraph expert?

A I recognize Mr. Palau as an expert. Not of the intensity that Mr. Arthur might be.

Q Were you advised that Mr. Palau has given Mr. Lawrence a polygraph test which Mr. Lawrence has not passed?

A No.

MR. DERSHOWITZ: Objection.

THE COURT: Overruled.

MR. SAGOR: May this be marked Government's Exhibit 12 for identification.

(Government's Exhibit 12 was marked for identification.)

MR. DERSHOWITZ: Your Honor, may the last question please be read back.

THE COURT: Yes.

(Question read.)

MR. DERSHOWITZ: Is the government representing that it has a good-faith basis for establishing that Mr. Palau has given Mr. Lawrence a polygraph test which he has not passed?

MR. SAGOR: Indeed, your Honor, Mr. Lawrence will be called to the witness stand and I will ask Mr. Lawrence specifically about such a test which will be very relevant in this case, and I do have such an examination.

THE COURT: Of course, the limitation upon what -- on the last few questions, although I take it there is nothing in the record to indicate that even though Mr. Lawrence may have been lying at the time of the administration of those tests, there is no indication they had to do with the subject matter of this particular lawsuit.

MR. SAGOR: That's correct.

MR. DERSHOWITZ: The government cannot so represent.

THE COURT: Well, I am quite aware of that.

BY MR. SAGOR:

Q Now, Mr. Kaufman, when you saw Mr. Rosner, did you ask Mr. Rosner in any way whether you could see the Baron?

A I beg --

Q Did you ask Mr. Rosner in any way if you could see the Baron, Mr. Lawrence, the subject of this lie detector examination?

A No.

Q Did you just meet Mr. Lawrence this morning, by the way?

A Mr. Lawrence?

Q Yes.

THE COURT: Have you ever met Mr. Lawrence?

THE WITNESS: No, sir.

Q Was there another individual in the witness room that you just saw?

A There were two individuals in the witness room. I don't know their names. We didn't speak.

Q Was there a black individual wearing a white hat or a blue suit in the --

A No, sir.

Q Was there a black individual in the back room?

A No, sir.

Q Were you asked in any way whether you would give Mr. Lawrence presently a polygraph test?

A No, sir.

Q Did you ask in any way?

A No, sir.

Q Would you have been available to conduct a polygraph test of Mr. Lawrence if you were asked?

A Sure I would.

Q Would it have been possible,if you had been able to conduct a polygraph test of Mr. Lawrence, to ask Mr. Lawrence questions about the same area as reflected in the polygraph examination of Mr. Mahoney?

A It would have been.

Q And even if you did not conduct a polygraph examination of Mr. Lawrence, isn't it fair to say it would have been helpful to conclude as to the validity of the charts to interview Mr. Lawrence and see what kind of individual he was and how he responded, et cetera?

A It might have been helpful but I don't believe that helpful.

Q But it would have been helpful to reach a more positive conclusion?

A It might have been helpful.

MR. SAGOR: Excuse me one moment.

Your Honor, will defense counsel stipulate for the record that -- may I consult with Mr. Dershowitz for a second?

THE COURT: Of course.

To sum up your testimony, you are testifying, are you not, to the fact that based upon those charts and those charts alone you are of the opinion that the individual involved in the making of those charts was not lying, is that right?

THE WITNESS: Basically, yes.

THE COURT: What is the limitation?

THE WITNESS: Well, I prefer to take it the other way, your Honor.

THE COURT: You take it your way.

THE WITNESS: All right. That these charts do not indicate deception.

THE COURT: Yes, but that's all. You have read the charts and in your opinion the charts do not indicate deception?

THE WITNESS: That's correct. That's basically it.

THE COURT: Fine.

BY MR. SACOR:

Q Isn't it equally fair to say, Mr. Kaufman, that had you interviewed Mr. Lawrence, had you spoken to Mr. Mahoney, had you had other information, you may well have concluded with the addition of these factors that a proper polygraph result determination could have been reached in this case of deception, if you had that additional information?

A No way.

Q No way?

A No way.

Q So regardless of the fact that your interview with the Baron, of your speaking to Mr. Mahoney, of all these factors which you say would have been relevant and might have been done under other circumstances,

it is your conclusion that regardless of these possibilities there is no way that you could reach a conclusion of deception?

A That's correct.

Q So in your opinion, these charts are totally meaningless, is that correct?

A I didn't say that. I said those charts do not indicate deception.

Q Isn't it fair to say that they may well indicate deception to other polygraph experts?

A I doubt it.

Q You are saying there is no polygraph expert who could possibly look at these charts and conclude deception from that?

A No, I wouldn't say that either.

Q So isn't it fair to say there may well be others, aside from Mr. Mahoney, who can conclude from the charts and other factors that there was deception here?

A If there are others they would be a great minority.

Q Mr. Kaufman, when did you leave the New York City Police Department?

A 1964.

Q And did you ever conduct polygraph examinations

of police officers?

A I have.

Q While you were in the Police Department?

A Yes.

Q Have you read about Detective Leuci in the newspapers?

A Very little.

MR. DERSHOWITZ: Objection, your Honor.

THE COURT: I don't know where it is going. Overruled for the moment.

"Very little," he said.

Q Do you know Detective Leuci?

A No, sir.

Q Have you heard about him from other sources aside from the newspapers?

MR. DERSHOWITZ: Objection.

THE COURT: Overruled.

A I have.

Q What is your general fee for a polygraph examination of an individual?

A $150.

Q And what is your fee for coming into court today in connection with your study and testifying?

A I plan to send a bill for $100 for this

testimony.

Q Even after my cross examination?

THE COURT: Why, do you think that makes it more valuable?

MR. DERSHOWITZ: Objection.

THE COURT: Sustained.

Q So it's cheaper to come to court than examine the individual, is that correct?

MR. DERSHOWITZ: Objection, your Honor.

THE COURT: Sustained.

MR. SAGOR: Your Honor, we ask this witness remain here pending further receipt of other documents from the government.

THE COURT: What time do you expect them? He can be at his office and reappear when we want him.

MR. SAGOR: Yes, your Honor. Can he be on a half-hour telephone notice?

THE COURT: Yes, would you hold yourself available, please, at your office on 30 minutes' notice?

MR. SAGOR: What's your telephone number?

THE WITNESS: HA5-8555.

MR. DERSHOWITZ: I have a couple more questions.

THE WITNESS: Will you ask them to beep me.

I will be out of the office and I have the beeper.

THE COURT: You do understand you will get 30 minutes' notice --

THE WITNESS: I will be here.

REDIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q You were asked whether it would have been relevant in your conclusions to have learned that the Baron -- and I am just quoting from the question -- failed another lie detector test. Would it have been relevant to your determination to know that he was asked no questions on that other lie detector test in any way relating to Detective Leuci or to the allegations he made in the lie detector test, the charts of which you studied?

A It wouldn't have mattered one way or the other because I was merely asked to check the charts and I examined the charts and I came to the conclusion on the basis of these charts.

Q Would it have mattered in any way, in your opinion, to have been told that another lie detector test, the polygraph examiner concluded that he answered each and every one of the questions truthfully, with one exception?

A It wouldn't have mattered for the reasons

stated before.

Q Now, can a polygraph examiner, as a polygraph examiner, ever conclude reasonably that a person is lying on the basis of relatively flat charts?

A It's possible because people react differently but you have to have controls and there were no controls in this polygraph examination, at least no controls that I could see, so you couldn't compare them with known lies, and that makes it much more difficult to try to determine deception. If there were known lies in there that you could compare them with, then you might, in a relatively flat polygraph examination, conclude deception. But the way it stands, you can't.

Q So your testimony is that the way the charts stand, and we must assume you have been given all the charts --

MR. SAGOR: I object to that, your Honor. The government makes no such representation that we have any known charts. I turned over to him what I got from Mr. Sherman. I don't know truly whether I have any control questions, whether any tapes or any other relative indicia of lie detector examination exist because Mr. Mahoney is not here. I have instructed Mr. Sherman to tell Mr. Mahoney to come here. If he is

on a sickbed and cannot come, I cannot control it. I make no such representation that there is any completeness and thoroughness and that there are not indeed other charts. All I can say is I turned over to him everything I had that Mr. Sherman gave me.

THE COURT: I understand.

MR. DERSHOWITZ: Your Honor, that was an extraordinary admission by the government. It is my recollection it was your order they turn over to us all thw charts that Mr. Mahoney has. We have just been told all we have are the charts turned over by Mr. Sherman. We would like to renew our request to have all the charts turned over by Mr. Sherman.

The government can't have it both ways. Turning over the charts and telling us --

THE COURT: Does Mr. Sherman have other charts?

MR. SAGOR: No, your Honor. We got these charts recently from Mr. Dershowitz. Now, I got -- can only get what Mr. Sherman gave me. We are not directed to subpoena Mr. Mahoney.

THE COURT: I am directing you to give what is in the custody of the government.

MR. SAGOR: That's what I have done, your

Honor.

THE COURT: That's all.

BY MR. DERSHOWITZ:

Q On the basis of the charts and other information that you were given --

MR. SAGOR: I object. What other information?

Q -- the questions that were put to him --

THE COURT: Go ahead.

Q -- the answers that he gave and the charts, could a reasonable polygraph examiner who was an expert have concluded on the basis of that material positively that Mr. Richard Lawrence was being deceptive or was lying?

A I don't believe so.

MR. DERSHOWITZ: No further questions.

MR. SAGOR: No questions.

THE COURT: You may step down, and be available on 30 minutes' notice.

(Witness excused.)

MR. DERSHOWITZ: Your Honor, we have two other pholygraph examiners to be called. We could stipulate that essentially the testimony would be the same as we have heard today and admit two affidavits or we could call them. Whatever is your pleasure.

MR. SAGOR: Can I wait with that? I would like to see the material. I'm surprised that Mr. Dershowitz, in a spirit of fairness that he allegedly thinks he has and the government is unfair, has not apprised the government of any prior intent of having these charts studied. The government has not had an opportunity to go out and look for additional experts to look at these charts.

I clearly did not want to make this a battle. He has not given the government any notice whatsoever. Had this been done in reverse, your Honor, you would have heard a 40-minute speech from Mr. Dershowitz on how unfair this was.

I just want to reflect the government's position, being taken totally by surprise by the defense, what the government could characterize as a shoddy trick.

THE COURT: How long will it take you to recuperate from this shock?

MR. SAGOR: Ten seconds.

MR. DERSHOWITZ: Your Honor, may the record reflect that as long as two weeks ago I told Mr. Sagor that we wanted those charts produced in order to have experts examine them and testify. The record

will so reflect, the transcript will so reflect, and to call that a shoddy trick I regard that as an outrage.

THE COURT: Now that both of your honors have been vindicated, let's get down to business.

MR. DERSHOWITZ: Would the government prefer us to call the witness --

THE COURT: Why don't you show him the affidavits you apparently have. Then they can decide.

MR. DERSHOWITZ: In the meantime, we would like to call Mr. True from True Security who must leave again.

THE COURT: Mr. Sagor, do the best you can.

Who is the next witness?

MR. DERSHOWITZ: Mr. True.

THE COURT: We are going to have a recess at 11 o'clock and you can look those over then.

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R A L P H T R U E , called as a witness by the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q Good morning, Mr. True.

A Good morning.

Q I am sorry about the personal inconvenience problems you had. I appreciate your coming.

Do you recall the time when the Government asked your agency to conduct a polygraph examination of one Richard Lawrence?

A The True Securities Industries, yes. I don't know the exact date, I am sorry, but it was in January of '73, I guess.

Q And did you assign Mr. Mahoney to conduct that examination?

A That's right.

Q You yourself are not a qualified polygraph expert?

A I am a licensed polygraph examiner in the State of Virginia.

Q But do you conduct your own polygraph examinations generally?

A Not generally, no. I have done polygraph interviews and I can do polygraph interviews.

Q Did there come a time in the middle of the polygraph examination that was being conducted on Mr. Lawrence when Mr. Mahoney came out and said to you, I think maybe he is telling the truth?

A Going back two years trying to bring out the exact details --

Q No, just in general.

A Mr. Mahoney, being a lawyer, if I may say this, is a very meticulous person in interviews. Using the polygraph, as he did in his interviews, as an aid to his interviews, he also used his ability as an interviewer to put the two together to come to conclusions, if you will, or opinions.

At the time of this interview, I recall -- I don't how long he was with the subject -- but I recall his coming into the office with charts saying something to the

effect, I need more time with this subject. I am not quite sure as to the analysis I can make. I need to take more time. I would like to get some more information.

Now, I was in and out of the office and I don't know exactly the additional information he might have asked for as I recall the facts.

At any rate, I said to the best of my recollection, well, Harry, this is an important case, let's be sure. Don't finish until you are sure. That was my instruction to him.

Q Did he convey to you in words or substance at any point during this process that up to that point he thought it was possible that the Baron was -- that Mr. Lawrence was telling the truth?

A It was a possibility. But he couldn't be sure because he hadn't finished interrogation.

Q But at the time he came out, he said there was a possibility that Mr. Lawrence was telling the truth?

A A possibility.

Q Do you know whether at that time he had run tests and obtained the charts?

A Yes.

Q By the time he came out and told you that?

A Yes. This is what was the problem. You see,

I guess it was his gut feeling plus his interrogation ability using the polygraph charts he had, it was his opinion at this time, I've got to go further. I can't definitely say. There seems to be a problem here. I don't know -- I don't know just what it is but I got to go on.

Q At the time he came out and made that statement to you, he had already made charts, as I understand it?

A Yes.

Q Did he go back at that point and conduct further interrogations or to your knowledge did he go back and administer more tests and obtain more charts?

A I believe he ran more charts.

Q Do you know that for a fact?

A I believe I recall that he had three or four charts in his hand. He had several streams of them. I can't say for a fact but -- I don't even recall the number that was sent out.

Q Would it refresh your recollection to look at the charts that Mr. Mahoney produced?

A You know, if these are the charts that Mr. Mahoney gave, this is the best way and honestly I can answer. I can't recognize these charts from any others. But if these are the charts that Mr. Mahoney said he ran, then they

are the charts..

THE COURT: Your answer is you don't know whether they are the charts or not?

THE WITNESS: I don't know.

Q Can you tell by looking at those charts whether certain of those charts were made at one point and then a stop and then other of those charts were made after a sufficient pause to be able to have had that conversation?

A There is a -- chart No. 1. That would mean that would be the early part of the interview. In fact, that is the first chart he ran in the interview. I don't know what's a continuation here, but there is chart No. 2. He doesn't have the time on them but just the date.

Now, what was the question again, sir?

Q Can you tell whether or not it was --

A No, because this is not the form that they ran. They were long. There might have been two tests on one running of chart paper.

Q Did there come a time when Mr. Mahoney went back to the room, finished conducting other tests and came back and told you in words or substance the following:

I think the Baron may be holding something back on me?

A I believe that was his opinion.

Q Was that the sum and total basically of his opinion, that he was holding something back?

A He was holding something back. As I recall, he felt that deception was being practiced to some of the questions.

Q Deception in terms of affirmative deception or that he was simply holding back and not providing --

A If he said deception, he meant --

Q What did he tell you, did he use the word deception with you or did he use the word holding back?

A "I don't think he is telling the truth. I just don't feel the man is leveling with me. I don't think he is telling the complete truth."

Q In other words, what he said to you is he may not be telling the complete truth about everything?

A Yeah.

Q But --

A In specific areas; no, sir.

Q He didn't tell you he was lying about everything?

A No, sir.

Q You conducted or supervised conducting many, many lie detector tests, I take it?

A Several, yes. Early.

Q There are degrees of failure of passing of lie

detector tests, are there not?

A You don't fail or pass. There are degrees of deception, if you wish to put it that way. In my opinion either a person practices deception with you or he is not and if he you can't make a decision, there has to be an inconclusive test.

Q Are you saying that in your experience when a lie detector test is administered, the results have to be basically that he is telling the truth or that he is lying, that there are no intermediate grades?

A There could be intermediate grades. It depends on the type of test, the circumstances and the conditions.

Q Just a few more brief questions.

At the time you conducted this polygraph test, had you previously done any work with the Bureau of Narcotics and Dangerous Drugs?

A No, sir.

Q Does the firm True Securities exist at the present time?

A No, sir. Not to my knowledge, it doesn't, unfortunately.

Q When did it terminate its business?

A I was terminated the 16th of March, 1973 due to lack of funds to further finance.

Q When did True Securities begin operations?

A It was incorporated in the State of Delaware in August of 1972.

Q When did it begin its actual operations?

A Not until approximately November. October or November of '72.

Q When did You conduct to your recollection your first lie detector tests? I am not talking about you. I am talking about True Securities.

A Oh, my. We could have had two or three in November or December. I am not sure about that. A few with some retail concerns.

Q And your last lie detector test?

A The last one?

Q Yes.

A I would n't know because Mr. Mahoney remained there after I left until May some time.

Q So essentially True Securities remained in existence conducting lie detector tests for a total of about four months or five months?

A Five months. Yes.

MR. DERSHOWITZ: No further questions.

Thank you.

MR. SAGOR: I have a few, your Honor.

CROSS EXAMINATION

BY MR. SAGOR:

Q Mr. True, you have never spoken to me before?

A No, sir.

Q You have never spoken to anybody in the United States Attorney's office?

A No, sir.

Q It is fair to say you were a defense witness in this case, is that correct?

MR. DERSHOWITZ: Objection.

THE COURT: We all know who called him.

Q Mr. True, Mr. Dershowitz did not bring out your background In Government. I believe you were employed by the Central Intelligence Agency?

A That's right.

Q For how long were you employed by the Central Intelligence Agency?

A Well, I started in 1950 and left in '72.

Q I am not going to ask you what you did there.

How many polygraph examinations did you conduct in the course of your experience as a polygraph examiner?

A As a polygraph examiner?

Q No, in the Central Intelligence Agency or otherwise?

A I have, I guess, approximately two to three thousand cases.

Q Two to three thousand?

A Yes, over the 25-year period.

Q Did you know one Mr. Fuller?

A Did I know a --

Q Mr. Fuller, yes?

A I know a Mr. Fred Fuller.

Q With the Bureau of Narcotics & Dangerous Drugs?

A Oh, I'm sorry. Pat Fuller. Yes, indeed.

Q Has he known you a long time?

A I would say since 1970, perhaps. '69 or '70.

Q Is it fair to say that you have an excellent reputation in the security and law enforcement community?

A I would hope so, sir. There is no reason why I shouldn't have.

Q Would you tell us something about Mr. Mahoney that Mr. Dershowitz did not ask you about.

Who is Mr. Mahoney? Can you tell us something about his background?

A Mr. Mahoney was a former employee of the Agency. He was -- before he was in the Agency, he practiced law and then went to work with John Reed & Associates, polygraph specialists in Chicago.

Q Was this before the CIA?

A Yes. Then he went to work in CIA. And came to us as a polygraph examiner in CIA.

Q Mr. Mahoney, then, is an attorney at law.

Do you know where he graduated law school?

A In Chicago. Northwestern University. I am not sure of that.

Q And then he went to work for who, Reed Polygraph Associates?

A Yes.

Q How long was he with Reed Polygraph Associates?

A I think he worked for them while he was going to school. So I don't know the number of years exactly.

Q Upon graduating law school, he had an association with the Central Intelligence Agency?

A I think he was still with Reed when he came to the Agency.

Q How long was he with the CIA?

A He might have been with the Navy some place.

Q I think you are right.

How long was he with the CIA? 15 years?

A At least that.

Q And do you know in the course of his professional career how many polygraph examinations he has conducted?

A I wouldn't know.

Q Is it fair to say 10,000?

A Oh --

MR. DERSHOWITZ: Objection, your Honor. If he doesn't know, he doesn't know.

Q Are you talking about thousands?

A I wish I could give you an estimate. I would be safe to say that he has done -- the time that I was familiar with him in polygraph work, 1500. But after that, that was back in 1950, I believe, that he had other assignments and so did I and I don't know what happened after that.

Q Do you think he has conducted a few after 1950?

A I am sure he has, yes.

Q It would be fair to say that he has conducted at least as many as you have, is that right?

A I would hope so.

Q And you have conducted how many, two or three thousand?

A I think that's right.

Q Does Mr. Mahoney to your knowledge belong to any professional associations, polygraph associations to your knowledge?

A Yes, he belongs to the American Polygraph Associ-

ation, the same as I do. I am an affiliate. He is a member. Virginia State Polygraph Association. He has now been selected by the State, as I understand it, to be on the Board of Examiners of new examiners before they are licensed.

THE COURT: New polygraph examiners?

THE WITNESS: Yes, sir.

Q Is this in Virginia?

A Yes.

Q Do you know, by the way, whether Mr. Mahoney is suffering from any medical disability presently?

A I have been told and by talking with him on the phone, naturally, I did, he has been under a ruptured spleen. Tnat's all I know.

Q Have You spoken to him on the phone?

A I did talk to him on the phone because I wanted to know where the charts and things were. Because I was asked to bring them and I didn't have anything.

Q What --

A They had been turned over to the Government.

Q Did there come a time that Mr. Mahoney concluded his examination of Richard Lawrence?

A Yes. I would say that time was when he sent the report forward.

Q Prior to sending his report, did you discuss with Mr. Mahoney the conclusions he had reached?

A I accepted his conclusions and his opinions and endorsed them in the report to the Government.

Q And prior to accepting his opinions and conclusions, did you study with Mr. Mahoney the charts that he had made?

A No, I did not study. I accepted his -- I briefly looked over them because I feel that an examiner, if he has any goods to produce at all as an examiner, must make his opinions on his own interview and not by the influences of anybody else or his supervisor. It is his responsibility to make the decision.

Q In your professional judgment, Mr. True, is it fair to say that the interview of an individual, wholly apart from the charts, is an important factor in reaching a conclusion as to deception or truth telling?

A Very important. The setting up of the interview, the pre-interview with the subject, the way the rapport is established between the examiner and the subject and particularly between tests, how the examiner relates his feelings to the subject in order to get him to talk, to resolve stresses, if you will, at certain points.

Q It is fair to say that by the end of the inter-

view, Mr. Mahoney imparted to you that he had sufficient time by the time he finished to make a full and careful and conclusive examination of the subject, is that correct?

A Yes, sir. And when I endorse a report of any examiner that worked for me at any time, I endorsed it that he had -- there were no artifacts of any kind in there, that everything was a proper, appropriate interview was conducted in the right circumstances. Technically the instrument was right and that I felt that the examiner had conducted the interview in a proper manner and I endorsed it by signing it.

Q And this, again, was after you looked over the charts and after you discussed it with Mr. Mahoney?

A Yes.

Q I show you what has been previously marked Government Exhibit 4.

MR. SAGOR: Your Honor, I misplaced 4 in evidnece. I have re-marked 4 for identification and ask that this be -- go in again as 4 in evidence.

I show it to Mr. Dershowitz.

THE COURT: You represent it is a copy of the one that was received yesterday?

MR. SAGOR: Yes, your Honor.

THE COURT: Received.

Q Mr. True, I show you what is Government's Exhibit 4 in evidence.

Can you identify that document?

A Yes. This is my transmittal.

Q Does that document reflect your signature, Mr. True? Of course, it is a Xerox copy.

A Yes, sir.

Q Is that the final report that is annexed to your signature at page 2 which reflects what is in all the charts and all the interviews and your opinion and Mr. Mahoney's opinion?

MR. DERSHOWITZ: Objection. He never stated he had an opinion.

THE COURT: Read the question, please.

I take it you are referring to the opinion in the letter, in the exhibit?

MR. SAGOR: Yes, your Honor.

THE COURT: There is an opinion expressed in the exhibit.

MR. DERSHOWITZ: I mean an opinion of the accuracy of the charts.

THE COURT: Let me hear the question again.

(Question read.)

THE COURT: Rephrase the question.

Q The bottom line of it, Mr. True, that's the final report?

A It is the opinion of the examiner based on the subject's records that he is not telling the truth on the above listed questions.

Q When you say the subject's records, is it fair to say that also includes his interview --

A The details of the interview.

Q That is your report also?

A That is Mr. Mahoney's report and that's the letter I signed. I recall the report but not in detail.

Q Do you have any reason to believe that's not a true and accurate examination to the best of your ability and Mr. Mahoney's ability?

A Absolutely not.

Q Do you have any reason to believe that not sufficient time was taken in connection with the preparation of that report or the total examination?

A Preparation for the interview allowed one day. There should have been sufficient time in my opinion.

MR. SAGOR: No further questions.

THE COURT: Do you have any?

MR. DERSHOWITZ: Just one.

hp

THE COURT: After the morning recess. We will take the morning recess at this time.

Ten-minute recess.

(Recess.)

(In the robing room.)

MR. SAGOR: Your Honor, I have a brief application. If I am given an opportunity to speawk to Mr. True for a few moments, I think I can reach some stipulation on the polygraph charts and perhaps not even have to call Mr. Kaufman back, if I may have five minutes.

THE COURT: All right.

MR. DERSHOWITZ: I called for this conference, your Honor, to give you a schedule. We are almost through.

THE COUR I gather that means you are not going to call Mr. Lawrence.

MR. DERSHOWITZ: Our present inclination is not to. We are very anxious and have been right from the beginning to see Mr. Agiuluz.

THE COURT: Is he in the building?

MR. DERSHOWITZ: I heard he was out of state.

MR. JAFFE: No, he is not. He is in some hospitai, I was told, by Mr. Giuliani and he will be back at 6 o'clock.

MR. DERSHOWITZ: I was told by Mr. Giuliani he had been flown out of state. I asked him if he was in a hospital and he said he couldn't tell us that. I asked where he was and he said he couldn't tell us that.

Were we able to call Agiuluz, we would probably finish before lunch.

THE COURT: Where is Agiuluz now? I am going to let them see him.

MR. JAFFE: I have related to you what Mr. Giuliani told us. The Marshal doesn't tell us. Under the special program --

THE COURT: He is in protective custody?

MR. JAFFE: Yes, your Honor.

MR. DERSHOWITZ: It would be a great convenience to all of us, I'm sure, if we could end this hearing today, subject to us being given an opportunity to speak to Agiuluz. If we then meet him, we could perhaps open the record --

THE COURT: Only with him. In other words, I want to close the hearing, except for Agiuluz or anything you may have learned from Agiuluz.

MR. DERSHOWITZ: We have to add to that all the information we got this morning which we haven't had a chance to read.

THE COURT: Yes, of course. I haven't read the file yet. I may have to bring you back at 2 o'clock and keep you until I have read that file and decide what will be made available. There is one more exhibit I

haven't had a chance to go through. There is one folder I notce, which looked like a Police Department folder.

MR. SAGOR: So-called Taylor memoranda. They are not his memoranda. They are material from the DEA file which relate, as I understand, to papers in an investigation that DEA conducted with the Police Department.

THE COURT: I have to read that, and I would like to do that before Professor Dershowitz goes back to Massachusetts.

MR. JAFFE: There is also a file --

MR. SAGOR: Yes, there is --

THE COURT: Let me make this perfectly clear. I only have one folder left up there.

MR. SAGOR: There are two folders you did have. One was post-trial allegations, unsubstantiated --

THE COURT: Isn't that the one I ruled on?

MR. JAFFE: No, your Honor, that was the total debriefing of Leuci which included --

THE COURT: I only see one more folder up there, gentlemen, but I will take a look.

MR. SAGOR: There are post-trial allegations unsubstantiated, Court Exhibit 5.

THE COURT: I am not turning over unsubstantiated allegations. I have ruled on that.

MR. SAGOR: And the so-called Taylor folder is what your Honor is probably talking about. I believe that's Court Exhibit 3.

THE COURT: I have to go through that and it is rather substantial and I will have to ask you to come back, and we will sit around and I will read it.

MR. SAGOR: May I make a suggestion.

Is it possible a conference call can be set up with Mr. Dershowitz perhaps speaking to Agiuluz?

THE COURT: Why don't you do that during the luncheon recess?

MR. SAGOR: The Government wants him to --

MR. DERSHOWITZ: We might be able to stipulate that. The other matter, we have to have an opportunity in some way to find out what Mr. Mahoney has to say. He is sick. We would like to try to call him.

THE COURT: You have to do that on your own. You can do that in the interim. I told you that next week I am taking as a week of vacation. I will not be here and I would take it I don't know whether you plan on submitting memoranda, you made reference to it, and I would hope you could have that by a week from Monday.

MR. DERSHOWITZ: Yes.

MR. SAGOR: We will follow very soon after.

Four, five days.

MR. DERSHOWITZ: May I ask a week from Tuesday?

THE COURT: Yes.

MR. DERSHOWITZ: What we would like to do then is, if Mr. Mahoney is available, talk to him and --

THE COURT: If he has a ruptured spleen, he is in trouble.

MR. DERSHOWITZ: Maybe a deposition or interview or stipulation or something.

THE COURT: It depends on how sick he is.

MR. DERSHOWITZ: That's what we have to find out.

THE COURT: I am given to understand a ruptured spleen is a serious thing.

MR. DERSHOWITZ: We do know from an investigator -- I am not making a representation -- he was sitting in his back yard recuperating.

THE COURT: I think you can find all that out next week.

MR. DERSHOWITZ: I am just asking for an opportunity to find that out. With that in mind --

MR. SAGOR: They have recorded conversations back in February 1974. Why don't they interview him?

THE COURT: What's the difference? I am going to be gone next week. He wants to talk to Mr. Mahoney.

If Mr. Mahoney will see him, that's that.

MR. DERSHOWITZ: I think the other things we can do out there or here. We did want a representation from the Government as to whether they had an opportunity to check the wiretaps we asked about.

MR. SAGOR: I put on the record what I know.

THE COURT: Do you have any other witnesses other than True to call?

MR. DERSHOWITZ: We have Mr. Sagor, that's all.

MISS BAKER: Mr. Taylor is unwilling to talk to me in an interview situation, so --

THE COURT: It doesn't matter because I am coming back at 2 o'clock. I have a luncheon with Judge Knapp, not to discuss this case but we do have lunch together, and I shall be back at 2 o'clock and I will read the file at 2 o'clock and you can call whatever other witnesses you want at that time if they exist and I will make available whatever there is in that file that I should think should be made available.

MR. DERSHOWITZ: We can call Mr. Sagor this morning then'

THE COURT: Yes.

MR. SAGOR: They may have things planned for the Baron.

THE COURT: If he has told you what he has told you, it's abundantly clear he is not calling the Baron and the possibility always exists, representing a lawyer, that he might call Mr. Baron after discussing it with his client. The chances are remote of him calling the Baron and you are extending the record needlessly.

Let's move on.

MR. DERSHOWITZ: I think we are ready to talk to Mr. Sagor.

THE COURT: Did you want to talk to Mr. True for a few minutes?

MR. SAGOR: Yes, your Honor. We can perhaps then stipulate to his affidavit.

MR. DERSHOWITZ: There is no objection to that. Just one more thing.

We will not seek to introduce anything the Baron says for its current truth. That is, what we are not going to say is we are going to prove Leuci has committed crimes, through Baron. Our theory is Leuci has admitted whatever crimes there were. The only relevance the Baron has is the fact that the Baron made certain allegations and --

THE COURT: Which in your judgment were not properly investigated.

MR. DERSHOWITZ: That's all.

THE COURT: You have his affidavit that sets forth his allegations and the affidavit was in the motion papers and it was on the basis of that affidavit that I granted a hearing in this matter.

MR. SAGOR: I assume your Honor will then strike the affidavit because we will destroy the Baron if they put him on the stand. He has lied and I think he will send him to jail if he takes the stand.

MR. DERSHOWITZ: The Baron has indicated he is willing to take the stand and --

THE COURT: I don't think the record need be extended on this.

MR. SAGOR: Do you want to call Mr. Taylor first or --

MR. DERSHOWITZ: I think we should call you first.

THE COURT: Who is Mr. Taylor?

MR. SAGOR: Another defense witness, I guess.

MR. JAFFE: The Assistant Regional Director in DEA.

MR. SAGOR: Why don't you call him first? He has been standing around for days.

THE COURT: All right. Let me know when you are ready.

(Recess.)

(In open court.)

MR. DERSHOWITZ: As the session closed, I think it was my turn to put redirect questions to this witness, and defendant has no questions of this witness.

MR. SAGOR: Your Honor, may I ask some questions?

THE COURT: Yes.

MR. SAGOR: Your Honor, I have here the affidavits of various people that I understand Mr. Dershowitz is submitting. Will they be defense exhibits?

THE COURT: Isn't this merely a situation that both sides stipulate if these people were called, they would testify as to what is in the affidavits? If anybody has any qualms about marking them defendant's exhibits, you can mark them Court's exhibits.

MR. SAGOR: Defendant's Exhibit F, then.

THE COURT: If these were called, they would testify as indicated --

MR. DERSHOWITZ: Your Honor, at the present moment it is now our intention to call the witnesses. We had thought the Government had rested and we were prepared to stipulate that. On the basis of further questioning, we are now prepared to call them at 2 o'clock this afternoon.

MR. SAGOR: I think it would be totally cumulative, and I object, but I would like to continue.

THE COURT: Yes.

(Defendant's Exhibit F was marked for identification.)

xx R A L P H T R U E , resumed.

CROSS EXAMINATION

BY MR. SAGOR:

Q Mr. True, did anyone from the Government tell you what conclusion to reach in connection with your report that the findings were deceptive?

A Absolutely not.

Q Have you had an opportunity, at the recess, to examine Defendant's Exhibit E in evidence?

A Yes.

Q Are these certain charts pursuant to which the reports were written?

A I assume so, yes, sir.

Q Is it fair to say upon your examination you would not characterize these charts as being "relatively flat"?

A No. If they were relatively flat, you would have to have an inconclusive chart.

Q In your opinion, these charts are --

A Excuse me, you may have to have an inconclusive

chart. A relatively flat chart can indicate two things, one, either the person being interviewed absolutely is numb emotionally or, secondly, he might be under sedation and there would be an inconclusive result.

A person that is telling the truth, in a polygraph test, normally there are proper questions built into the test such as norms and control questions, to be able to not come out with flat charts so that you can make a decision there is no deception practiced.

Q Let me see if I understand you correctly.

Mr. True, these charts which you have just examined, Defense Exhibit E, in your opinion they are not "relatively flat", is that correct?

A No, sir, they are not.

Q Priot to coming here you said you never spoke to anybody in the United States Attorney's office. Did you have a conversation with Mr. Dershowitz?

A Prior to coming here?

Q Yes, prior to testifying.

A Yes.

Q And Mr. Dershowitz asked you whether in your opinion these charts were "relatively flat"?

A Yes. I'm sorry, not Mr. Dershowitz. I believe it was Miss Baker.

Q Whom you understand to be Mr. Dershowitz' associate, another attorney?

A I assume that, sir.

Q What did you tell Miss Baker about whether in your opinion --

MR. DERSHOWITZ: Objection, your Honor.

Is this premised on the statement that before coming here to testify he had that discussion?

THE WITNESS: No, not before coming here.

Q When did you have this discussion?

A At the recess.

Q At the recess?

A Yes.

Q After you testified or before you testified? I don't understand.

A Right here at the recess, after we broke up, I talked to Miss Baker.

Q But not before you testified?

A No, sir, not on the charts. Let me think a minute, so much has gone on here.

No, I don't believe it was before I testified, sir.

Q In your opinion, do these charts indicate stress?

A In certain areas, yes, sir.

Q Now, I show you what has been marked Defendant's Exhibit F for identification and direct your attention to, which I will read, and I think you may have looked at this exhibit, the affidavit of Thomas McShane:

"It is my opinion, based upon my examination of the charts, that it cannot be concluded that Mr. Lawrence was deceptive, rather his reactions indicate that he was basically telling the truth."

In your professional opinion, Mr. True, based upon your examination of defense Exhibit E, is the statement of Mr. McShane correct?

A Mr. McShane, I believe, and anybody that would try to interpret the charts out of context, by that I mean away from the interview, not knowing the factors surrounding the interview, and the conditions under which the interviews were conducted, could be mistaken in making a state-

ment such as that.

Q Furthermore, if you just looked at the charts alone, just the charts alone, which I understand that would be an inappropriate way of making a determination -- is that correct?

A It is an inappropriate way to say whether a human being is lying or not by just an interpretation of flat charts alone.

Q Just looking at the charts alone for the moment, assuming arguendo you are looking at the charts alone, can you ever tell from looking at defense Exhibit E alone that someone was telling the truth basically?

A If there are no strong emotional stresses to certain points in the area, the questions, where the stimuli are, and the charts are relatively flat, I would say there wasn't any stress, the person wasn't concerned.

Q In fact, looking at these charts, defense Exhibit E, can you tell from these charts that someone was telling the truth, can someone reasonably conclude from those charts alone, which have those stress lines whichyou have testified about, that someone was telling the truth?

A I wouldn't do it unless I knew more about what went on in the interview.

MR. SAGOR: No further questions.

REDIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q You mentioned, Mr. True, before a test can be accurately evaluated there would have to be control questions, is that correct?

A Yes, there should be control questions, norm questions, properly spaced during the test.

Q Can you point us to the control questions? Or what was the other word you used?

A Norm.

Q The norm questions in this report?

A One is:

"Do they call you Larry?"

That is a norm question.

Two is:

"Are you over 20 years of age?"

That's considered norm.

Q Can you point to a control question?

A I really don't know whether I can in this case or not but let me see here in this first seven. I believe that a good question that could be consider as one is, "Have you ever lied to the BNDD?" in this case.

Q Would you explain how that would be a control

question?

A Well, from what I know about the gentleman involved, he had been working with the people and there could have been an occasion where hemight not have told them the complete truth about a certain thing or a certain activity. It seems that a person -- I would say I would consider it as a control question in his case because it is relevant to the issues: is he telling the truth about his relationship with the people in the BNDD.

Q Is it not the fact that before you could know whether something is a control question you have to know whether or not the subject is lying about it?

A There may be --

MR. SAGOR: Mr. True is Mr. Dershowitz' witness. I didn't understand he should be cross examined in --

THE COURT: This isn't an adjudication. Go ahead.

Q Is it not the case before you could know whether something is an adequate control question you have to know whether the witness is telling the truth or lying in response?

A Normally.

Q How can you ever know whether something is

an adequate --

A Excuse me now. I know what your question is and it is very valid.

I was not in on the preinterview and details of the interview. I said I'm assuming that a man in his position could have been in a position that the examiner knew of a question or an incident that had been explained to him that there might have been some fabrication and used that as a control which wasn't an important issue.

Q Could you please point to a place in the charr where question No. 6 is answered?

A Yes.

Q Can y ou tell us whether or not question No. 6 shows stress?

A There is a tightening up of the cardiovascular muscle here on the cardiosigmograph a slight stair step in the breathing and in the other a supp ssion in the breathing.

Q What does that show?

A Sensitivity, stress.

Q It shows therefore he may have been lying?

A Possibility.

Q Without knowing whether in fact he was or

was not lying as to that answer, can you use it as a control question?

A The examiner could if he had previous information.

Q If the examiner did not know whether Mr. Lawrence was or was not lying --

A He wouldn't use it if he did not know.

Q And if he did use it he would not be acting properly?

A I wouldn't say that.

Q He could use something as a control question without knowing --

A No, wait. He would only use a control question as a control question if he knew that the subject would most likely practice a little deception.

Q If he was wrong about that --

A Theonly way he would be wrong is if he didn't know some information, and a good examiner would never use a control question if he didn't have it down for sure.

Q In other words, if a person used a contol question and it turned out he was telling the truth as to that control question it might invalidate the control question?

A It could.

Q And it could invalidate the remainder of the test?

A Possible.

Q Do you of your own knowledge know whether the Baron was lying when he answered question No. 6?

MR. SAGOR: Objection.

THE COURT: Sustained.

Q Do you from your own knowledge know whether Mr. Mahoney knew whether the Baron was lying when he answered that question?

MR. SAGOR: Objection.

THE COURT: Sustained.

MR. DERSHOWITZ: Your Honor, the government was given wide latitude in eliciting information about Mr. Mahoney's expertise. It seems to me we should be allowed that in the context of this examination.

THE COURT: Sustained.

Q In your discussion with Miss Baker during the recess of this case did you tell her in words or substance that the stress -- that stress shown in charts of this kind might very well develop from flying somebody down from New York to a lie detector test in Virginia?

A Everything has to be taken into consideration. She asked me the question could there be influences to

cause these emotional stresses, I believe, something like that. I said there are many influencing factors that have to be considered. I don't know what the man's condition was the day that he came down to the test. I only saw him go through the chamber. I had no way of knowing whether he was in good physical condition or not. I had to leave that up to the judgment of the examiner.

Q Do you know whether the examiner took any notes of his interviews,if he had any, with Mr. Lawrence?

A No, I don't, sir.

Q Is it normal practice for an examiner to take notes?

A On his chart question sheet, on the question sheet where the questions are written?

Q Anywhere. Is it the usual practice to take notes if he conducted interviews?

A I would say yes.

Q Was it the usual practice in your own firm for examiners to take notes?

A Not as a practice, sir. I leave that up to the examiner's good judgment to have his interview validated from the information he obtained.

Q Do you know from your personal knowledge whether Mr. Mahoney took any notes in his interviews with Richard

Lawrence?

A I'm sorry, sir, I don't.

Q Is it fair to say you do recall he didn't show you any notes of his interviews?

A I don't recall seeing any notes of his interview, sir, other than the chart that -- the mimeographed chart with the questions written.

Q In the course of your discussion with Miss Baker did you volunteer the comment to her that flying down to take the test from New York could produce stress?

A Certainly it could. Many factors could produce it. Lack of breakfast, general nervous tension, many factors can influence a test under those circumstances. Again, I have to leave it up to the judgment of the examiner he has eliminated any possibility of these things influencing the test.

Q I take it it is your testimony that you, considering your own background and experience with the polygraph test, could not make any determination on the basis of this information available to you whether or not the Baron was lying or telling the truth at the time --

MR. SAGOR: Objection.

THE COURT: The information alone?

MR. DERSHOWITZ: On this information.

THE COURT: Show him what you are asking him about.

MR. DERSHOWITZ: The chart and the questions.

A If I may, there is another document here with my signature on it, which I signed, stating that I transmitted the polygraph interview forward to the government, confirming that the interview conducted by Mr. Mahoney -- this is what my memorandum means -- the interview conducted bu Mr. Mahoney was done under what I consider favorable conditions, and that his opinion was correct, as far as being a professional is concerned. I am in no position to question his opinion because I didn't conduct the interview myself, sir.

Q Are you now or were you in January of 1973 in a position to make an independent evaluation as an expert as to whether or not Richard Lawrence was lying or telling the truth?

MR. SAGOR: Objection, your Honor. No foundation.

THE COURT: Based onwhat?

Q Based on the totality of information available to you.

THE COURT: Let's see what that totality is. As I understand, your only exposure to this situation involving this fellow was that he walked by on his way to the chamber. You saw him walk by, is that correct?

THE WITNESS: That's right. And he was turned over to Mr. Mahoney.

THE COURT: During the course of the test, Mr. Mahoney came out and said that he needed further time?

THE WITNESS: He did.

THE COURT: And in substance you said take as much time as you need?

THE WITNESS: It's an important case, yes. Dealing with a human being we can't be wrong.

THE COURT: That was your total exposure to this man's examination, is that right?

THE WITNESS: That's exactly right, sir. I never saw the charts, in fact, after the 17th of January. I had a telephone call, maybe six months ago, from Harry and somebody from New York, I forget who it was called me, and I told him I was available whenever they want to interview me, but I didn't receive any further information until Saturday afternoon -- Saturday morning I got a call from Mr. Mahoney there was an investigator that wanted to

subpoena himand he was sick, and the next thing I know they were at my home.

THE COURT: Need we detain Mr. True any longer?

MR. DERSHOWITZ: Just one series of questions.

Q Can you tell us what a GSR line is?

A Galvanometer. In this case it is not working.

Q The galvanometer skin resistant test in this particular test was inoperative?

A Yes.

Q At the time the lie detector test was performed?

A Yes. And he is not a GSR man anyhow, if I may say so.

Q But there was a part --

A He didn't turn it on. Let's put it that way.

Q He didn't turn it on or it was broken?

A I don't recall. He didn't use it. Let's put it that way. A lotof people are GSR and a lot of them are not.

MR. DERSHOWITZ: No further questions.

MR. SAGOR: I found the missing exhibit, your Honor.

RECROSS EXAMINATION

BY MR. SAGOR:

Q How many parameters were used in connection with the test, pulse rate and --

A It appears to be two pneumograph tubes, one in the upper cavity and one in the lower cavity, the blood pressure cuff, and the plythesmograph.

Q Is that --

A Three mediums. Actually, four, if you will. There are two pneumographs.

Q It is called three different parameters?

A Right.

Q Isn't it fair to say on some polygraph people only use two?

A Some only use one, sir.

MR. SAGOR: No further questions.

REDIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q Do I understand the total number of indicators was how many?

THE COURT: Four.

THE WITNESS: Yes, sir.

Q Four --

A Two pneumograph tubes, the plythesmograph and cardiosigmograph and blood pressure cuff.

MR. DERSHOWITZ: I have no further questions.

THE COURT: You are excused.

(Witness excused.)

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THE COURT: Call your next witness, please.

T H O M A S P. T A Y L O R, called as a witness by defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q Mr.Taylor, in 1969 were you asked to conduct an investigation of certain allegations made against Detective Leuci?

A I wasn't asked but in '68 and '69 we had a joint investigation with the New York City Police Department involving a variety of allegations and people.

THE COURT: By whom were you then employed?

THE WITNESS: I was an inspector with the Bureau of Narcotics and Dangerous Drugs in New York City.

Q Can you tell us what steps you undertook in pursuance of your investigation?

A Well, a variety of steps were taken, including attempting to make cases on people we felt were dealing with Mr. Leuci.

MR. DERSHOWITZ: Could that answer be read back, please?

THE COURT: Yes.

(Answer read.)

Q As part of your investigation in 1968 and 1969, did you learn of an incident wherein Detective Leuci shared in $200 which were -- which was improperly or illegally taken from a house that was searched?

A No, sir.

Q When did you first learn about that incident?

A I'm not sure that I'm aware of even the incident you're talking about. I think you have to be more specific.

Q Well --

MR. SAGOR: Can I speak to Mr. Dershowitz for a second, your Honor?

THE COURT: Yes.

(Pause.)

Q I am advised by Mr. Sagor that you might remember this incident as the "$50 incident" or the Goe memorandum.

A Yes, I have heard of the Goe memorandum, yes.

Q When did you first learn about the allegations contained in the Goe memorandum relating to this so-called $50 incident?

A I would say I saw the Goe memorandum some time

within the last week.

Q Is this the first you have ever --

A You have to understand that I left Inspection in February of '72 and this was a memorandum that was made subsequent to my leaving.

THE COURT: Let me see if I can get a handle on this.

You are aware of the particular matter that we are referring to in the Goe memorandum, are you not?

THE WITNESS: Yes, sir.

THE COURT: Now, quite aside from when you learned about the Goe memorandum, when did you first learn about those facts which are reported in the $50 incident in the Goe memorandum?

THE WITNESS: Within the last week, your Honor.

THE COURT: Before that you never heard of this situation?

THE WITNESS: No, sir.

Q In preparation for your testimony here today did you have an opportunity to review any files or look at any notes?

A I did look at some files and memoranda, yes.

Q In looking at those files and memoranda did you come across the Goe memorandum?

A No, sir.

Q Can you tell us what notes and memoranda you did review in preparation for this trial -- this hearing?

A There were memos concerning investigations dating back in '68 and '69.

Q Do you have those files with you?

A No, sir.

Q Do you know where those files currently are?

A They are in the hands of the U. S. Attorney's Office.

MR. DERSHOWITZ: May we request those files be turned over to us for inspection?

MR. SAGOR: Your Honor, they have been marked Court's Exhibit 3. They were turned over at the discovery date. As I understand it, this investigation that Mr. Taylor helped out in the New York City Police Department --

THE COURT: That's the file --

MR. SAGOR: The summary allegation of that was in the first folder, the folder that your Honor examined way back when at the time of the trial. I

think the questions of Mr. Taylor will show this investigation was unsubstantiated and he got off the investigation --

THE COURT: In any event, Professor, the existing rule of evidence is that you may look at anything from which a person has refreshed his recollection while he was on the stand. The proposed Federal Rules of Evidence, which are not yet in effect, provide that you may look at anything from which a witness prepared himself for testimony. Those rules are not in effect yet. You are not necessarily entitled to see, under the existing rule, anything he may have read before he got here without some showing as to why I should do that.

MR. DERSHOWITZ: I am aware of a Second Circuit opinion that the proposed rule ought to be followed even before they are formally adopted. It is in the spirit of that holding and suggestion that I ask for an opportunity to see these records.

THE COURT: Denied.

Q Did there come a time earlier this year when you turned over to Mr. Sagor various memoranda?

A There came a time when I caused memoranda, which were under the control of Inspector Sherman to be turned over to Mr. Sagor.

Q But you did not turn over files which you had within your office?

A The files in question were not under my control. They were Inspection files. I am now in Enforcement.

Q To your knowledge, did anything in those files in any way refer to the Goe memorandum, the $50 incident, the $200 incident, or anything relating to Mr. Leuci having shared in $200 improperly seized from a home?

A To the best of my recollection, no.

THE COURT: Just to point it up a little more, and correct me if I misstate the facts, we are talking about an incident where pursuant to a search warrant two federal people and two New York City people went to a certain premises and in the course of it, of their search, stole $200. A hundred was retained by the federal people and a hundred was retained by the state people, of which Leuci got $50.

Have I stated it substantially correctly?

MR. SAGOR: Yes, your Honor.

MR. TAIKEFF: No. Your Honor stated there was a search warrant.

THE COURT: Perhaps there was not. The remaining is as I have stated it, is that correct?

MR. TAIKEFF: Yes.

THE COURT: Does that refresh your recollection as to when you may first have heard about this incident?

THE WITNESS: I would say it was not part of the memoranda that I saw and I became aware of the contents of the Goe memorandum within the last week or two at the most.

BY MR. DERSHOWITZ:

Q You hadn't heard about this incident before you read the Goe or became aware of the Goe memorandum, is that what you are testifying?

A To the best of my recollection, yes.

THE COURT: All right. I don't know what more I can do to make it clearer.

Q Can you tell us what your investigation of Mr. Leuci in 1968 and 1969 turned up?

A Basically many allegations which we were unable to substantiate.

Q Allegations of dealing in drugs?

A Yes, sir.

Q Can you tell us whether any of the allegations in the files were substantiated?

A They weren't substantiated, to the best of

my recollection.

Q Did I misunderstand your first answer to my first question by saying that we were looking to make cases against people who were dealing in drugs with Leuci?

A What I said was that it's -- one of our techniques would be to attempt to make cases on people we thought or were alleged to be dealing, you know, with police officers.

Q Did you have any information at that point indicating that there were poeple who were making cases with Leuci -- who were making buys from Leuci or sales to him?

A Yes, sir.

Q But as far as you know, you did not have at that time any allegations in your possession, substantiated or unsubstantiated, relating to this incident which the judge described in such detail.

A No, sir.

MR. SAGOR: He left in '72.

Q At the time of the '68 and '69 investigation all my questions are related to.

MR. DERSHOWITZ: One moment, your Honor.

Q Do you recall whether or not your investigation

in 1969, '68, disclosed allegations by any person called Saint?

A Not allegations by the Saint, but I recall there were allegations involving St. Clare Calender, alias the Saint, that he was engaging in improper activities with police officers and agents.

Q In 1968, 1969 were you aware that St. Clare Calendar was known as the Saint?

A Yes, sir.

Q Were you aware of any allegations concerning a man named Cornbread?

A Just recently the name came up. Not back in '68 or '69 that I can recall.

Q Were you aware of any allegations concerning involvement between Leuci and a man known as Slim?

A Not that I can recall.

Q Were you aware of any allegations involving a man named John? A very common name, I know. A man named John who might have had any dealings with Leuci.

A To the best of my knowledge, no.

Q Would it refresh your recollection to know that the man named John had a store on Utica Avenue and Eastern Parkway?

A No, sir.

Q That he had a brother-in-law named Wong?

A No, sir.

Q Can you tell us from your present recollec-

ion whetheryou know for a fact whether any such allegations

ppear in these files?

THE COURT: You mean as of what time?

MR. DERSHOWITZ: As of 1968, 1969, the so-

lled Taylor files.

A Well, other than perhaps St. Clare Calendar, would say no, they don't appear.

Q How recently have you read the files?

A Within the last week.

Q Does St. Clare Calendar's name appear in the le?

A I don't believe so.

Q Does the name Saint appear in the file?

A I don't believe so, no.

Q Did your investigation produce information allegations concerning the Saint?

A On other individuals, is my recollection.

Q On other individuals. There are no allega-

ons made that you know of that the Saint had any ug dealings or any illegal dealings with Robert Leuci?

A To the best of my recollection, there were individuals. I can't specifically place them with ations against Leuci.

Q Would it refresh your recollection to look t file again?

A I don't believe so.

Q You are absolutely certain that the name does not appear in any of those files?

MR. SAGOR: Objection, your Honor. What relevance of it?

MR. DERSHOWITZ: If Mr. Sagor can't see the ce of this line of questioning I would be very happy ain it.

THE COURT: Overruled.

Do you know whether your investigation up any allegations concerning drug dealings between Leuci and anybody known as Joe Legs?

Yes.

Do you know who Joe Legs is.

To the best of my recollection, it is Joseph I believe is his name.

Do you know whether your files contain any ons or your investigation disclosed any allegations dealings between Robert Leuci and a man named

Tommie Capiello?

MR. SAGOR: Objection, your Honor. The question is are there allegations or is it revealed the allegations were substantiated or unsubstantiated.

MR. DERSHOWITZ: Allegations is the question.

THE COURT: I believe the witness has already testified that none of these allegations were established, is that correct?

THE WITNESS: That's correct, your Honor.

THE COURT: Then I sustain the objection.

Q Did you ever contact in the course of your investigation anybody known as Nick Conforti?

A Yes, sir.

Q Did you contact during the course of your investigation anybody named Verrichio?

A Verrichio?

Q Did you?

A Yes, sir.

Q Did you during the course of your investigation contact somebody named Cardi?

A Yes, sir.

Q Somebody named Jacobs?

A Not that I can recall.

Q Would it refresh your recollection to look at the file?

A No, sir. To the best of my recollection, that name isn't in there.

Q You don't think your recollection would improve by having an opportunity to read the files?

A Well, it's possible. If you want absolute substantiation, I guess, yes, I can review the files.

Q Did you contact any person named Diaz?

A Not to the best of my recollection.

Q Anybody named Cataldo?

A No, sir.

Q Now, as to the persons who you did contact, did you make anotes of your interviews with them?

A Let me state that I didn't contact directly all of these people. There are allegations from these people that you have named. My testimony would be that I didn't directly contact any of them but I am aware of allegations that came from them.

Q You are aware that somebody in your office contacted them?

A I'm aware that we had information that came from the street that they were saying certain things and that there are records of what they said, yes.

Q And the records of what they said appear in your files?

A Yes, sir.

Q Jackie Donnelly, is that one of the persons who you contacted?

A No, sir.

Q Were some of these people you contacted reliable federal informants?

A Which people are you talking about?

Q Joe Legs?

A I don't believe they were at the time.

Q Were any of them people who previously had a history of being reliable federal informants?

A Most of them were junkies is my recollection.

Q I am asking you whether any of them were federal informermants as well.

THE COURT: You are asking whether they were reliable federal informants. He told you they were junkies. I take it that's an answer that a junky is not a person regarded by this witness as being reliable.

Is that correct?

THE WITNESS: Yes, sir.

Q You have never in your experience come across a junky who was a reliable--

THE COURT: I will stop this. Please move along to something else.

Q Do you recall precisely when it was that you turned over these files to Mr. Sagor?

MR. SAGOR: He said he never physically --

Q When the files were authorized by you to be turned over to Mr. Sagor?

A I didn't authorize their turning over. I just acted as a conduit for their turning over.

THE COURT: When was it?

Q Can you tell us when it was?

A It was shortly before Mr. Sagor had to submit an affidavit to the court, which would probably have been in early April, I would say.

THE COURT: Of this year?

THE WITNESS: Yes, sir.

Q Had you previously been asked by anybody in the United States Attorney's Office as to whether or not you had had such an investigation?

A Yes, sir.

Q By whom?

A By Mr. Sagor.

Q When?

A I would say originally in December or January,

probably, of this year.

Q Was that the earliest time that you had any discussion with any member of the United States Attorney's Office as to the investigation you conducted which included Robert Leuci in 1968 and 1969?

A That's a pretty broad question.

Q Let me try to narrow it. Did you ever have discussion with Mr. Scoppetta aboutthis investigation?

A Yes, sir.

Q When?

A I would say the time of the Knapp Commission hearings, he was aware that there were allegations on Mr. Leuci.

Q Was he aware that you had a file containing allegations against Mr. Leuci?

A Yes, sir.

Q Did you ever have discussions with Mr. Shaw relating to this matter?

A I don't recall.

Q Can you recall anybody else in the United States Attorney's Office with whom you may have had a discussion concerning your investigation in 1968 and 1969 which included Robert Leuci?

A I would say Mr. Jaffe also was re- -- recently became aware that there was such an investigation.

Q Mr. Morvillo?

A No, sir.

Q You recall definitely not having had a discussion with Mr. Morvillo?

A Right.

Q As to Mr. Shaw --

A Possibly.

Q Were you aware at any point during the year 1973 that Detective Leuci was a government witness at the Rosner trial?

A Yes, sir.

Q During the course of that trial or its preparation did anybody from the United States Attorney's office inquire of you as to whether you had made any investigation of Detective Leuci?

A No, sir.

Q Did you have any discussion with anybody in the United States Attorney's Office during the time around, surrounding the Rosner trial, say from June to December, 1972, of the investigation you had conducted?

A No, sir.

Q When did you first learn that Mr. Leuci would

be a government witness in the Rosner case?

A I would say it was apparent he would be a witness when I found out about the substance of the case.

MR. DERSHOWITZ: Your Honor, we have no furtherquestions of this witness, subject, however, to a possible recall of the witness after Mr. Sagor testifies as to how the Goe memorandum was produced. Because his footnote in his affidavit certainly suggests that this witness may have information about that.

THE COURT: All right. Do you have any questions, Mr. Sagor?

MR. SAGOR: Yes, your Honor.

CROSS EXAMINATION

BY MR. SAGOR:

Q Mr. Taylor, in connection with the investigation that was being conducted in 1969 was that your investigation or was it really the Police Department's investigation?

MR. DERSHOWITZ: Objection, your Honor. A characterization.

THE COURT: Overruled.

A It was a joint investigation conducted by my office and members of the New York City Police Department.

Q Is it fair to say the New York City Police Department had all the information that you had in connection with that investigation?

A Yes, sir.

Q And it is fair to say that when you spoke to Mr. Scoppetta at the Knapp Commission he understood that the Police Department had any information that you had, is that correct?

A Yes, sir.

Q And it is further fair to say that in 1970 any federal aspect of the investigation was closed out?

A That's correct.

Q And the New York City Police Department continued the investigation?

A I presume so.

Q To your knowledge, that investigation, if any, was continued by the Internal Affairs Division?

A Yes, sir.

Q And to your knowledge, at the time that Detective Leuci testified in the Rosner trial some time before that allegation was closed out by the Internal Affairs Division as being unsubstantiated, is that right?

A It was closed out, yes, if that's your question.

Q During the course of your investigation, just to complete the record, did there come a time when you personally interviewed Richard Lawrence?

A Yes, sir.

Q And when did that occur?

A Inspector Wurms and I interviewed him in our office at 26 Federal Plaza. I can't put a date on it.

Q Some time in 1969?

A '69. I am not certain of the exact date.

Q And what, if anything, did Mr. Lawrence tell you about corruption at that time?

A He in effect denied that he had any knowledge of corruption on the part of any police officers or agents.

Q Is it fair to say -- just one final question -- that your office did the best that it could to substantiate or have some hard evidence against Detective Leuci back in 1969 --

MR. DERSHOWITZ: Objection, your Honor.

THE COURT: Sustained. He told us what they did. The rest is characterization.

BY MR. SAGOR:

Q Did you ever get such evidence?

A Such evidence of what?

Q Of drug dealings that -- were you successful in your investigation?

A No, we weren't.

MR. SAGOR: No further questions.

REDIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q Did your investigation disclose any information when Anthony Pasaro visited Leuci at Leuci's home?

A When was this supposed to have taken place?

Q Did your investigation disclose any such visit?

A My investigation when?

THE COURT: In '68, '69. The one you are talking about.

A I don't believe so. The name is familiar and the information might have taken place, but I don't believe it was then, back in '68 or '69.

Q But it is possible that you have information indicating that Anthony Pasaro did visit Leuci's home?

A I am not positive of the name so I can't make that statement flatly.

Q Do you know who Anthony Pasaro is?

A No, off the top of my head, I can't --

Q Do you know whether or not Pasaro was alleged to be a partner of Vincent Papa in narcotics dealings?

A I am familiar with Vincent Papa but I am not familiar with Pasaro at the moment.

Q But you do think it strikes somewhat of a bell, that there may have been some information --

A I recall that there was information, that a particular car was parked in the vicinity of his home. The name of the individual escapes me.

Q But it could be Anthony Pasaro?

A It could be anybody, really.

Q Would it refresh your recollection to look at your file to determine whether you have any information that Anthony Pasaro parked his car in front of the home of Robert Leuci?

A It wasn't in the file I reviewed. It is just something that strikes a chord. Where I heard it -- it wasn't in the files that I reviewed.

THE COURT: To your knowledge, was that ever substantiated?

THE WITNESS: I don't recall, your Honor, whether it was or not.

THE COURT: All right.

Q Did a man named Wurms ever provide to you any corroboration for the fact that a parked car with a license plate attributable to Anthony Pasaro was parked in front of Robert Leuci's home?

A Not to the best of my recollection.

Q Would you have any records or files that you could now go back to to check your recollection as to

determine whether or not there is any information indicating that Anthony Pasaro's car was parked in front of Robert Leuci's home?

MR. SAGOR: Objection.

THE COURT: Overrule.

A Would you repeat the question?

Q Are there any files or records that you can now consult which will help you to determine whether or not there is any basis for your recollection that Anthony Pasaro's car may have been parked in front of Robert Leuci's home?

A No files that I have under my control. I would have to see if I could run down somebody who came Up, maybe Mr. Wurms, who might have a recollection of the specific -- the incident.

Q Would it possibly be in the files of Anthony Pasaro or Vincent Papa's?

MR. SAGOR: Your Honor --

THE COURT: Sustained.

MR. DERSHOWITZ: Could we ask this witness over the luncheon recess to check those files? It would be a major piece of evidence if that could be corroborated.

THE COURT: What files are you talking about? What files are you talking about, Mr. Taylor? Are you

aware of any files in which this information might be located?

THE WITNESS: Not offhand, your Honor.

THE COURT: He said he is not aware of any specific files --

THE WITNESS: It's a piece of information that came to my attention. The more I consider it, I think it probably had to do with a Canadian plate rather than a -- but somebody who -- whose name was familiar to the Bureau.

Q Are there any people who you can ask in order to corroborate that information?

A I can try, yes.

Q Can you do that?

A Sure.

Q Now, did you ever interrogate Leuci as to the allegations that were made against him?

THE COURT: Is this the one more question you were going to ask?

MR. DERSHOWITZ: I didn't expect that answer, your Honor.

THE COURT: Go ahead. I think we ought to talk about the allocation of time. We are going to sit until 4.30 today. We will stop promptly at 4.30 and if

we have not concluded we will convene on Friday at 10 o'clock.

Q Did you interrogate Leuci as to the allegations?

A No.

Q Did anybody in your office?

MR. SAGOR: Objection. I assume '68, '69?

MR. DERSHOWITZ: '68, '69.

THE COURT: With respect to this particular information, this witness has not even said that this took place in '68 or '69.

Is that not -- did I misunderstand you?

THE WITNESS: Yes, it was a more recent --

THE COURT: This has not to do with '68 and '69. I didn't understand that from the beginning.

MR. SAGOR: Are we talking about Pasaro -- I am sure Mr. Dershowitz is talking about the original allegations against Detective Leuci.

THE COURT: Put another question will you, please.

Q Did you interrogate Leuci as to the allegations made against him during your investigation in '68 and '69?

A No, sir.

Q Have you inquired of Leuci relative to this Pasaro allegation?

MR. DERSHOWITZ: No further questions.

MR. SAGOR: I have no recross.

THE COURT: Step down, please.

(Witness excused.)

THE COURT: Call your next witness.

MR. DERSHOWITZ: I call Mr. Sagor as our next witness.

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E L L I O T G. S A G O R, called as a witness by the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q Mr. Sagor, would you tell the Court precisely how you came into possession of the Goe memorandum?

A To the best of my recollection, I came into possession of the Goe memorandum on or about April 8, 1974, but I had not read it, I believe, until some time on April 9th, 1974.

Q Can you tell us the circumstances under which you came into possession of the Goe memorandum?

A Sure. There came a time after you wrote a letter to the United States Attorney's office in December 1973, that I on various occasions thereafter asked Mr. Taylor

to get me any information that he had where the name Detective Leuci came up and then there are some times in March, I had not received the files, there came a time in March, after the allegations concerning Richard Lawrence were made, when I renewed my request to him. When I first spoke to him in December, he indicated that your letter, the allegations in your letter were unsubstantiated and my insistence upon receiving all information in Government files that he could get for me for Detective Leuci had abated somewhat in January.

I renewed my request to him in March and I told him I wanted any piece of paper, without characterizing the paper, where Leuci's name was mentioned or where the Baron's name was mentioned and I understand that he asked -- made this request of Mr. Sherman and there came a time when Mr. Sherman's office, either he or someone from his office brought a file to my office which contained, when I looked at parts of the file on April 9, the Goe memorandum.

Q So it was the file that came from Mr. Sherman's office that contained the Goe memorandum?

A Let's understand what you mean by the file.

There are several pieces of paper that was in the file. There was no Arco clamp or clip clipping any file together. What I understand is they had drawn

together from various files and made a comprehensive search and after spending many hours on this comprehensive search, that was one of the documents that came to me through Mr. Taylor.

Q Did you review that file before you submitted your affidavit dated April 9, 1974?

A Well, let's be clear what I did review.

Judge Bauman's chambers had called my office and indicated just a few days prior that the Government papers in response to the Baron's allegation had to be in on April 9 and I was preparing those papers in a very hectic day. I did not have a chance to complete any investigation concerning the Goe memorandum when I saw it on April 9, 1970. I did see it on April 9, 1970, but as you know, I saw Detective Leuci on that date and given the information he had given me on that date, I did not report the Goe memorandum to the Court at that time.

Q I just want to get the chronology straight.

A Sure.

Q On April 8, you got the file?

A I believe it was some time before the time of the Government's response of April 9, 1974, and to the best of my recollection, the papers physically came to my office on April 8, 1974. I could be mistaken by a few

days, but I think April 8 was the day that we got it and the day that I first started to go through the papers. However, I did not see the Goe memorandum on April 8. The first time I saw the Goe memorandum was an hour or so by the time the 5 o'clock deadline that the Government's papers were due in Judge Bauman's chambers on April 9.

Q On April 8th you reviewed the file?

A No, I reviewed the file in part that Sherman had given to me. I did not complete my review of the papers, but I wanted, of course, to see all papers prior to the Government's response in answer to Lawrence's allegation and not completed that review until the very last minute. I made enough of a review of the file, aside from the Goe memorandum, to respond on April 9 to the Lawrence allegations.

Q So to be clear, you had gone through some of the files on April 9 --

A April 8th.

Q And then again on April 9th?

A Yes.

Q You had not quite gotten up to the point of the Goe memorandum before you filed this affidavit?

MR. JAFFE: Objection. Asked and answered.

THE COURT: Overruled.

A By the time of signing the final paper I had come across the Goe memorandum. I had not completed, however, my interrogation of Detective Leuci concerning the Goe memorandum of other people in the United States Attorney's office to determine the appropriate response to the Goe memorandum. I realized right away that the Goe memorandum, if true, and if in Government possession and known to the Government at the time, was a document which should have been turned over to defense counsel at the time of trial. However, it was my opinion that it would be inappropriate for the Government to mention the Goe memorandum in the Government's affidavit of April 9, one, because it was not called for at that time; two, because the investigation -- it was not called for by the Lawrence allegations.

Two, my investigation was incomplete as to the validity of the Goe memorandum on that date. I had just seen it late on the afternoon of April 9th.

Q So you did see the Goe memorandum before you signed this affidavit?

A Yes, I did.

Q Did you notify the Judge of the existence of the Goe memorandum on that day or the next day?

A No, I did not.

Q Did you write the following statement in your affidavit of April 9 --

A Mr. Dershowitz, if it's in the affidavit, I wrote it and it's there. The record speaks for itself. I am familiar with the statement. If you want to ask me a question on it, I will be glad to answer it.

Q Was the following statement made by you on the 9th of April the complete truth as you then knew it --

A Yes, it was.

Q May I read the statement?

A I know the statement.

THE COURT: Please, Mr. Sagor. I will run the courtroom.

Q In connection with the letter the United States Attorney's office has been able to receive from Mr. Taylor memoranda made of the 1969 investigation conducted by the Police Department and him of Leuci and others. Mr. Taylor advised your deponent that these allegations were never substantiated by the Police Department or himself and that his part of the investigation ended in 1970.

These documents will be held for the Court's inspection if desired.

Do you now regard that as a completely truthful and candid statement as to the information you then had

available to you with regard to the Taylor memoranda, files contained therein and the Goe memorandum?

A Absolutely.

Q During the course of April, May and June of 1974, were you aware that a petition for a writ of certiorari was pending in the United States Supreme Court?

MR. JAFFE: I object to the relevance of that.

THE COURT: I don't know where it's going. Everybody knows there was a writ of certiorari pending in the Supreme Court.

Q Were you aware of that?

A That you had made a petition for the Supreme Court. Yes. I was probably aware of it even before.

Q Were you aware that we, the defense, were trying to supplement the record at that time in front of the Supreme Court to try to bring to their attention all relevant information indicating that Detective Leuci had not told the complete truth with regard to his trial testimony?

MR. JAFFE: I object, your Honor. I don't see where this is going. What the Government did with regard to the Supreme Court is a matter of record before the Supreme Court. Has nothing to do with the evidence that's been developed at this hearing.

MR. DERSHOWITZ: May I make an offer?

THE COURT: All right.

MR. DERSHOWITZ: We will argue there were a variety of suppressions in this case. The last of which we think was a deliberate intentional attempt by the United States Attorney's office to keep information from the United States Supreme Court pending a petition for a writ of certiorari. They, in fact, succeeded. This Goe memorandum was not brought to the attention of the Supreme Court and the Supreme Court acted before this was made available to us.

THE COURT: I think that this charge is of the utmost seriousness and you better be ready to prove it.

Go ahead.

MR. DERSHOWITZ: I certainly will, your Honor.

Q Were you aware at the time that we were trying to make all effort to bring this material to the attention of the -- to bring material relating to Leuci's lack of credibility to the attention of the United States Supreme Court?

A I can't answer that question, Mr. Dershowitz. I can tell you that I saw -- I think there came a time when I saw your record before the United States Court of Appeals, which would be before I came in contact with the Goe memorandum.

As you know, the Government responded in papers that we thought it totally inappropriate for you to go outside the record in the Rosner trial to the Court of Appeals to make allegations which you since now know have been unsubstantiated. Whether I believe, having seen that you had done it in the past, whether I believed you were going to do it before the United States Supreme Court, I don't know. I don't know I had seen any of your papers where you would be going outside the record in connection with the record then before the Supreme Court. I do know that the United States sua sponte on its own, after certain allegations had come, certain admissions of Detective Leuci had come to the attention of the Government, wrote to the -- called the Solicitor General on its own in or about late April to advise the Solicitor General of the United States that Detective Leuci had made new admissions of misconduct and of course, the Court should know about it.

Q Did you advise the Solicitor General's office of the existence of the Goe memorandum?

A I don't think so. No, that is correct. I will tell you the reason why.

Q I will not --

THE COURT: Why?

THE WITNESS: Given the recent admissions of

Detective Leuci which the Solicitor General knew about, the admission on his part of the $50 was totally insignificant. It was absolutely de minimis and I don't think it occurred to anyone to bring that admission to the attention because it was totally superseded by the importance of Leuci's admissions for the consideration of the Solicitor General.

Q Do you recall a statement in substance in the Solicitor General's brief indicating that the defendant has brought to the attention of the Supreme Court no evidence of pretrial suppression?

A No, I do not.

Can I see that?

Q Yes.

Did you read our brief, did you read at any point the brief submitted by the Solicitor General's office to the United States Supreme Court?

MR. JAFFE: Objection.

THE COURT: I will permit it.

A I read the gray supplemental memorandum. I did not see your brief. You told me you were going to send me the brief. I had always the curiosity to see what papers you would submit and I asked for at some point your petition to the Supreme Court and I assume any other

papers you file, but I never did read it. You never did send it.

Q You received every copy of every paper we filed in the United States Supreme Court.

A Let me put it to you this way. It did not come across my desk. It may well have been sent to the office. I don't know. I have a copy of the -- if you want me to get my file copy.

Q We have our copy too.

Can you tell us precisely on what date you informed us of the existence of the Goe memorandum?

A Yes. The Goe memorandum, I believe, was, and you can correct my recollection. At least I know on paper it was in a recent affidavit that the Government submitted.

Q On what date was it given to us, the substance of the Goe memorandum?

A Mr. Dershowitz, you could refresh my recollection. Other than the papers filed in court, I don't have any knowledge of when I spoke to you. As you know, from many times we have conversations where we discuss what is happening in the case. If you would be so kind as to refresh my recollection if we had any such conversation, I would be glad to confirm or deny it. I know it was brought to your attention in connection with recently filed

papers in the court in this case, the date of which is a matter of public record. I don't remember the date.

Q Do you recall whether you gave us the Goe memorandum before or after the United States Supreme Court denied certiorari in this case?

A It may be after.

Q Is there any doubt in your mind as to when it was?

A I don't know the record, Mr. Dershowitz. I assume that the denial -- the denial of certiorari has nothing to do with the Goe memorandum and again, it had nothing to do with the knowledge of the Goe memorandum on the part of the Supreme Court. It is the consistent position of the Solicitor General of the United States that these recent admissions by Detective Leuci, significant admissions which was brought to his attention, would in no way affect, he thought, legally and believed by the Southern District, that that was of any significance, and as I indicated, the $50 matter just pales by comparison.

Q Are you aware that it was part of the theory of the defense In its presentation before the United States Supreme Court that the case of Merorach versus the United States might be an arguable precedent for the Supreme Court considering the matter of Leuci's perjury in deciding whether

or not itself to grant a new trial?

MR. JAFFE: Objection, your Honor. It isn't a legal --

THE COURT: Sustained.

I am still waiting for testimony to the effect that the United States Attorney deliberately withheld information from the Supreme Court. I would like you to get to that immediately.

MR. DERSHOWITZ: We will, your Honor.

THE COURT: That may be in tomorrow morning's headlines, but I want the proof of it today.

MR. DERSHOWITZ: The proof will be established, your Honor.

One moment, your Honor, while we borrow the Government's brief to the Solicitor General.

THE COURT: I tell you what. We will take the luncheon recess now. We will resume at 2 o'clock and I direct you to direct yourself to that particular accusation at 2 o'clock.

MR. DERSHOWITZ: We shall, your Honor.

(Luncheon recess.)

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AFTERNOON SESSION

(2.00 p.m;)

E L L I O T G. S A G O R , resumed.

MR. DERSHOWITZ: May I continue my questioning, your Honor?

THE COURT: Yes.

MR. DERSHOWITZ: Thank you.

THE COURT: You would like to address yourself, please, to the accusation you made.

MR. DERSHOWITZ: I shall.

DIRECT EXAMINATION (Continued)

BY MR. DERSHOWITZ:

Q I just want to go over the chronology of events --

THE COURT: I want to be sure what you said. You said the United States Attorney deliberately suppressed evidence in the Supreme Court of the United States.

MR. DERSHOWITZ: The United States Attorney's office.

THE COURT: All right, go ahead.

Q The new trial motion in this case, as you recall, was filed, and you asked me to refresh your recollection --

A I know, Mr. Dershowitz. March 20th, 1974.

Q The Goe memorandum first came to your attention on April 8, 1974?

A No, April 9th, 1974.

Q The file came to your attention on April 8th and the memorandum --

THE COURT: Yes, he said that this morning.

Q And the Government's response, your affidavit was submitted on April 9th, 1974. Tell us when Mr. Agiuluz first made his revelations, to your knowledge, to Government officials concerning charges relating to Robert Leuci?

A I don't think Mr. Agiuluz ever made it. This is not an area I am really competent to tell you anything about. I can only tell you from these proceedings what I understand, because I never, to my knowledge, spoke to Mr. Agiuluz, perhaps hello or good-bye, I don't know. From what I understand from these proceedings, Mr. Agiuluz has never made a charge against Detective Leuci. He some time in late February, I understand, spoke to Mr. Giuliani and he mentioned Detective Leuci but made no charges against Leuci. He himself, as I understand in these proceedings, was never criminally involved in anything with Detective Leuci.

Q Is it not the fact at one point Mr. Agiuluz brought to the attention, to your knowledge, of various Assistant United States Attorneys that Robert Leuci is one

of the big men in narcotics violations?

MR. JAFFE: Objection.

THE COURT: Overruled.

A Mr. Dershowitz, I don't know. As I told you, Mr. Jaffe and Mr. Giuliani have had contact with Mr. Agiuluz.

Q When did you first learn that there were contacts between Mr. Agiuluz and members of the United States Attorney's office either in the Eastern District or Southern District?

A When did I personally first learn?

Q Yes.

A I don't know that I ever learned, Mr. Dershowitz. I may have made a surmise that Detective Agiuluz may have been cooperating with the Government when there was an article in the Daily News, suggesting that that might be a possibility, but it should reflect I had little contact with the official unit. I'm involved in securities investigations and that's apart from matters concerning Detective Agiuluz.

Q At the time that you submitted your affidavit on April 9, were you aware that Mr. Jaffe, mr. Giuliani, Mr. Puccio were interviewing Mr. Agiuluz in reference to allegations concerning members of the SIU?

A Members of the SIU?

Q Former members of the SIU?

A I really don't know. I don't think so. I don't have any real knowledge. As I said, I'm not concerned with that at all. I assume if there was a possibility that Detective Agiuluz was cooperating, it's conceivable, but I have no understanding that that was a happening at the time.

Q At the time you were preparing to respond to the new trial motion of March 20th, did you ask Robert Leuci whether or not the allegations in the Baron's affidavit were true?

A Yes. I did ask Detective Leuci.

Q Did you ask Detective Leuce whether he would be willing to submit an affidavit as to the falsity of the statements made by Richard Lawrence?

A No, I did not ask him that question. I did not feel that an affidavit from Detective Leuci was necessary in opposition to the Government motion. What I felt was necessary was submitted to the Court. Detective Leuci denied the allegations, the record should reflect.

Q At the time that you responded to the motion of April 9th, did you have any knowledge inconsistent with Leuci's denials of allegations contained in the Baron's

information, contained in the Baron's allegations?

A No.

Q Could you, as a responsible attorney have permitted Robert Leuci at that time to have filed an affidavit denying unequivocally all of the allegations made in the Baron's affidavit?

MR. JAFFE: Objection.

THE COURT: Sustained.

Q When did the Leuci revelations occur? I'll quickly go through this.

April 17th, is that correct?

A I have no personal knowledge, Mr. Dershowitz. From what I understand of these proceedings, that is the date that Mr. Leuci first made revelations to, I understand, Mr. Giuliani and Mr. Puccio.

Q Do you know when the Solicitor General filed his brief, original brief in response to our petition for certiorari in this case?

A I have since learned, I think it's April 19th, is it not?

Q Do you know when it was?

A No, I don't.

Q Do you know whether it was before or after the revelations made to Mr. Jaffe, Mr. Puccio, Mr. Giuliani?

A I can only base my statement on what you have mentioned in open court, Mr. Dershowitz, and I wouldn't want to comment on what I think the accuracy of that is. I don't know as a matter of personal knowledge. I can only know what you have been saying and I don't rely on those statements all the time. But, I think it may be April 19th, from what you have been saying, but I wouldn't want to vouch for that.

Q You did not have an opportunity in the recess today to check to see when the Solicitor General's brief was filed?

A Frankly, Mr. Dershowitz, I felt that your allegations were so outrageous, I preferred to eat lunch as to look into when the date was.

Q Did you at any time read the briefs submitted by the Solicitor General in April of 1974?

A Yes, I did.

Q Do you recall what it says?

A Yes. I remember there was a footnote in the Solicitor's brief which said that there was no -- perhaps you can give me a copy and I can read it, it's a matter of record -- do you have a copy?

Q I do not now have a copy of that brief.

A Do you want me to respond from my recollection?

Q Yes. You can check your copy.

A I don't know that I have a copy.

MR. JAFFE: Do you want the supplemental --

THE WITNESS: I think the question is --

THE COURT: The original brief. Go ahead.

A There was a footnote in that which indicated there was nothing in the record before the District Court which indicated that Detective Leuci had been involved in misconduct other than what he testified to at trial. I suspected that the basis for that footnote was allegations made by you unsupported by any record -- and you can answer the question better than I -- perhaps allegations that you hadmade before the Supreme Court, as you had done before the Second Circuit, based upon information you had heard, totally unsubstantiated, which you brought dehors the --

Q Do you recall any mention in the Solicitor General's brief in relation to the suppression or argument that was made in relation to the SIU files about the government's position on the SIU files?

A Well, one of the points that you had raised before the Supreme Court, which had been denied before the Second Circuit, was that Judge Bauman improperly ruled on failing to -- improperly ruled not turning over to

defense counsel the unsupported allegation in the summary file of the IAD file. Yes, I remember that point was raised --

Q Do you remember what the Solicitor General said about that?

A I don't think so, but I think what the Solicitor General said was consistent with the government's brief in the Second Circuit.

Q Which was?

A Which was that there was no obligation to turn over that file to defense counsel. Detective Leuci was fully cross examined on the allegations and denied them, and it was brought to defense counsel's attention there were allegations against the detective, and he was cross examined on them.

Q In substance, was there any statement in the Solicitor General's brief to the effect that the allegations made in those various files were without substance?

A I don't know. I don't know. If you have the brief I would be glad to look at it.

Q Did you read the brief at the time, at some time between the time it was filed and the time you turned over the Goe memorandum?

A I think so, but the thing that caught my eye

was the footnote, not word for word the argument. If you have the brief I would be glad to look at it to see if I remember a particular sentence. It was sent to me by the Department of Justice. as an accommodation since I had sent them the materials for writing up the brief. I don't know that I read it word for word.

Q Do you recall when the Solicitor General first learned that Detective Leuci had made certain statements inconsistent with his trial testimony?

A I think -- I'm not sure. I should point out I had no personal part in talking to the Solicitor General. That's handled by the Appellate Section of the United States Attorney's Office.

After receiving the Goe memorandum and upon learning that that allegation concerning the $50 was true, and they were at that time -- they were equally being briefed on the fact Detective Leuci had made new admissions, so it was brought to the attention of the appellate counsel, Mr. Gordon, who is out of the country now, and that was some time in late April, and I think at the same time we received a copy of the Solicitor General's brief where that footnote was which indicated something about perhaps there being additional misconduct on the part of Detective Leuci. At any rate, due to a

number of factors the government, Mr. Gordon, was informed of Detective Leuci's recent allegations as he was informed about the $50, and I think he called the Solicitor General, Mr. Frye, in Washington some time on or about April 30, 1974.

Q And told him what?

A I don't know, Mr. Dershowitz. The very least I know is that it had come to the attention of the government that Detective Leuci had committed additional acts of misconduct other than he testified to at the trial, but I was not privy when Mr. Gordon spoke to Mr. Frye.

Q Do you have any specific knowledge as to whether Mr. Gordon told Mr. Frye about the Goe memorandum?

A I do not, Mr. Dershowitz. I am sure the notion that Detective Leuci had taken in 1965 $50 was told to Mr. Gordon, and I take it too that that's part of the picture, albeit a miniscule part of the recent revelation of which he told the Solicitor General about.

Q You know for a fact that Mr. Gordon knew about the Goe memorandum?

A I would say yes, prior to April 30, 1974.

Q But you do not know for a fact whether Mr. Gordon told the Solicitor General through Mr. Frye of

the --

A No. I have an expectation but you are not asking for that.

Q Now, on what date was the suit filed by Mr. Nadjari's office against Mr. Curran's office?

MR. JAFFE: Objection.

THE COURT: I would like to know that myself. Go ahead, if you know.

A I don't think I do. I think it may be a matter of public record, the affidavit -- you may have the affidavit of Mr. Curran. You obviously had it, Mr. Dershowitz.

Q Yes, we do, and I think the record will show that the suit was filed one day after the United States Attorney's Office first notified the Socilicitor General's Office about the charges and statements made by Mr. Leuci.

Now, would you tell me on what day your office first learned that Mr. Nadjari was contemplating such a lawsuit?

A I would have no idea.

MR. JAFFE: Excuse me, your Honor, I don't think Mr. Sagor has any information about that and --

THE COURT: I don't think I am concerned

about it and I will not be diverted about it. I want to hear the testimony -- and this is irrelevant, mind you -- I want to hear the testimony that supports your charge the United States Attorney deliberately suppressed evidence in the Supreme Court of the United States and that's all I want to hear until that point is resolved.

MR. DERSHOWITZ: Your Honor, this is the --

THE COURT: Go ahead, please, don't argue. You have made that charge. You support it.

MR. DERSHOWITZ: That's what I intend to do? your Honor.

Q Is it a fact, to your knowledge, that the United States Attorney's Office learned prior to May 1, 1974 that Mr. Jadjari was contemplating bringing a lawsuit against Mr. Curran?

A I don't know, Mr. Dershowitz.

Q To your knowledge, when it was first learned that Mr. Jadjari would be bringing a lawsuit against Mr. Curran, did the United States Attorney's office then know that the statements made by Mr. Leuci to Mr. Nadjari, Mr. Giuliani and Mr. Cuccio would become a matter of public record?

A If you are asking if the United States attorneys were motivated --

Q Can you answer the question I put to you?

A You want to get at something?

THE COURT: Just go ahead, Mr. Sagor.

A What is the question?

Q To your knowledge, did the United States Attorney's Office know, when it first learned that Mr. Nadjari was going to bring a lawsuit against Mr. Curran, that at that time the revelations about Leuci's statements would become a matter of public record?

A Mr. Dershowitz, your question is confusing. I stumbled after you said did I know when it first learned. I assume when it first learned it knew. I didn't understand the question thereafter.

Q At the time when the United States Government first learned that Mr. Nadjari was contemplating bringing a lawsuit did it understand that the Leuci revelations

would become publicly disclosed?

A I cannot answer for what was in Mr. Curran's mind. I can tell you, if you want to get it out, why the government brought to the attention of the Solicitor General the information. It had nothing to do with Mr. Nadjari's suit, absolutely nothing.

Q Tell us about that?

A I just have.

Q You told us what it doesn't have anything to do with. Do you want to rest there? That's fine.

MR. JAFFE: Your Honor, can we ask Mr. Dershowitz not to argue, to pose questions?

THE COURT: Go ahead.

A I will tell you why I spoke to Mr. Gordon way in advance of April 30, 1974. When I saw the footnote in the Solicitor General's brief, which came to me several days after the brief was filed -- it was sent to me by Mr. Richman in the Department of Justice since I had sent him information; he was one of the people working on the Solicitor General's brief, and as a courtesy he sent me a copy of the brief -- as soon as I saw the footnote, I called up Mr. Gordon and expressed to him the possibility that the government had an obligation, I thought perhaps, to get in touch with the Solcitor General

of the United States and inform him, since you had made charges which I thought would be inappropriate to bring before the Supreme Court in the feeling that the litigation should not be brought before the Supreme Court, it should be brought in the District Court. At any rate, we thought you may have well done that and we discussed the possibility that the Solicitor General should be notified, and Mr. Gordon took it up with whomever else he spoke to. But that was in advance of Mr. Nadjari's suit. I can tell you that my conversations with Mr. Gordon about notifying the Solicitor General were in advance of any knowledge on anybody's part, I assume, about the Nadjari suit.

Q Getting back to the chronology, do you recall learning, discussing with me a letter to be written by the Solicitor General to the United States Supreme Court indicating to the United States Supreme Court that it should not then pass on the petition for certiorari because some new information had become available of possible relevance to the Supreme Court's disposition?

A That's probably the hardest question you asked me, Mr. Dershowitz, to remember our many conversations. If I could be passed up my notes, I will look at my notation file to see if I have a memorandum of conver-

sation with you and then I will try to answer your question.

Q It would be approximately May 4th or [illegible] of 1974.

THE WITNESS: Can I have the correspondence file marked 2 over there on the table?

Thank you.

A I don't have a notation of it. I do know that you called me in that period. Why don't you refresh my recollection.

Q Do you recall a conversation with me during that period of time in which we discussed what representation should be made to the United States Supreme Court in order that it have full, as full information as possible about the recently revealed Leuci disclosures?

A We had some conversation, Mr. Dershowitz. I don't remember the full extent of it.

I know that you were mostly conferring with a person principally responsible for that, which is Mr. Gordon, who is really the best person to answer your questions. I know Mr. Frye, in the Solicitor's Office, too is available to answer questions. All I can know is, I give you the bottom line -- is that the Solicitor General, to our knowledge, was fully informed of all

relevant factors and he made the appropriate response before the Supreme Court --

THE COURT: Let's put in the record certain facts of which I am familiar, namely, that there came a time when a letter was written to me about which I informed counsel and which I sealed, part of which I have revealed this morning.

MR. DERSHOWITZ: I have not seen that, your Honor.

MR. JAFFE: Your Honor, the letter you revealed this morning is a May 28th letter, not the first April 23rd letter.

THE COURT: But in any event, I was asked at some time for permission to make available to the Solicitor General of the United States this information and I authorized it.

MR. JAFFE: That's correct, your Honor.

THE COURT: And presumably it was made available to the Solicitor General of the United States.

Does anybody know when?

THE WITNESS: Yes. On the date of the letter, your Honor, it was hand carried by special messenger to Washington by a Bureau of Narcotics agent and given directly to Mr. Frye in the Solicitor's Office,

and there is also an earlier letter written by Mr. Curran on April 23, 1974 to your Honor, advising him of Detective Leuci's recent admissions, which Mr. Dershowitz was specifically shown a copy of during the litigation of Nadjari against Curran, et al.

THE COURT: Well, it's my recollection, and if you know, correct me if I am wrong -- when was the Nadjari against Curran? That was early May?

MR. DERSHOWITZ: May 1st, 2nd, 3rd.

THE COURT: I was in Part I at that time. And I had the Nadjari against Curran matter.

Certainly at or about that time, as I remember it, and I invite either of you to correct me if I am wrong, Mr. Curran asked permission to send a copy of the letter I had sealed to the Solicitor General, which I granted, and you are telling me -- did he notify the Solicitor General before that?

THE WITNESS: We have a memorandum, your Honor, in the file that I looked at I think of a telephone conversation with Mr. Gordon -- Mr. Frye, rather, in Washington on April 30th, which would be before the Nadjari suit.

At any rate, as I say, it was discussed, I'm sure, between Mr. Gordon and Mr. Curran prior to that

time.

Q Nonetheless, your testimony is not changing, that you have no personal knowledge, nor, I take it, does Mr. Jaffe in his representations as to whether or not the Goe matter was ever brought to the attention of the Solicitor General's Office?

A That would be a matter of conversation between Mr. Gordon and Mr. Frye.

THE COURT: I decline to think that any person of intelligence would level a charge of deliberate suppression in the Supreme Court of the United States based on the Goe matter.

Go ahead.

Q Are you aware --

THE COURT: I surely assumed, and I take it you meant for me to assume, that it was infinitely more serious than some $50 payoff.

MR. DERSHOWITZ: It is infinitely serious, your Honor, as I intend to establish.

THE COURT: Good.

Q Getting back to the chronology, after the letter submitted by the Solicitor General on May 7, 1974, indicating that he would submit a brief, a brief was then submitted.

A I am not familiar with the Solicitor's letter. I have seen a copy of the supplemental brief of the Solicitor.

Q Okay. Did there come a time when the United States Attorney's Office for the Southern District of New York received in the mail the following typed copy whith crossouts and corrections of a proposed brief to be sent by the Solicitor General's Office to the United States Supreme Court?

THE WITNESS: Gentlemen, could I have legal file marked III?

MR. JAFFE: Mr. Dershowitz, since I am now counsel for the government, Mr. Sagor is now on the stand, would you show me what you just showed the witness, please.

MR. DERSHOWITZ: By all means.

MR. JAFFE: Are you going to mark it as an exhibit?

MR. DERSHOWITZ: I am showing it to him to refresh his recollection.

MR. JAFFE: Would you mark it as an exhibit, please.

MR. DERSHOWITZ: Mark it as an exhibit.

(Defendant's Exhibit P was marked for identi-

fication.)

THE WITNESS: Mr. Jaffe, could I also have a file in the part marked "Solicitor General," please.

Mr. Dershowitz, what date is on that exhibit that you have before you?

MR. DERSHOWITZ: It's early May. Just May, '74, is all that's stated.

THE WITNESS: Can you tell me who that would be sent by? That would help.

MR. DERSHOWITZ: Sent either by Mr. Andrew Frye or Mr. Edmund Kitch of the Solicitor General's Office in Washington, D.C. It could possibly have been postmarked by -- sent by Mr. Bork. His name is the name that appears on the brief but we all know the primary responsibility for this matter was in Mr. Frye or Mr. Kitch's office.

Q Mr. Dershowitz, it is possible it was sent to Mr. Gordon at one point and then sent to me. It's possible. I remember you told me something about you had seen a copy of a preliminary brief of the United States. I assume that's what you have in your hand. You can tell me.

Q Yes.

A Now, whether I saw it an read it, I really don't remember.

Q I asked you whether or not you know to your personal knowledge whether a copy of that brief was sent to the office of the United States Attorney for the Southern District of New York?

A I want to help you, It is possible I myself have seen it. I have no recollection of it but it is truly possible. I don't know.

Q Do you know for certain whether Mr. Gordon saw it?

A I don't know. If he sent it to me. He may have seen it and not read it or -- I don't know what. I know that it's something that has a familiar ring to it. Whether it is because you told me about it or because I had actually seen it, I do not know.

Is that a preliminary brief to the Solicitor General's supplemental memorandum, is that his?

Q Yes.

A I've seen a telegram from the Solicitor General but that wouldn't have strike out marks in it.

Q No, this is a brief, a copy of which, as I understand it, was sent to the -- I am asking you, was a

copy of this sent to the United States Attorney's office in the Southern District of New York to your knowledge?

A It is quite possible. Indeed, I may have even seen it. As I sit here now, I have no present recollection of it.

Q Did you see the final brief that was filed?

A Yes, I did.

Q Do you recall the following statement that appeared in the final brief --

A Do you have the final brief there?

Q I have a page excerpt. I think your counsel table has a full copy of the brief.

THE WITNESS: Mr. Jaffe has it in his hand. Can I read it in the brief?

Q Right.

A What page are you reading from?

MR. JAFFE: Let the record reflect I am handing up a supplemental brief in the Supreme Court of the United States, Docket Nc. 73-1062.

THE WITNESS: You must also remember that Judge Bauman was furnished a copy of this too.

THE COURT: That is true.

Q Okay.

Now, may I read to you one brief paragraph.

A Why don't you direct my attention to it?

Q I prefer to read it.

A We can read in New York too.

Q We submit these are determinations that --

A What page are you on?

Q Page 9. Carried over to the bottom of page 10. The last paragraph beginning at the bottom of page 9.

"We submit these are determinations that should properly be made by the trial judge who presided at the trial and is fully familiar with the facts of this case. It should be made only after hearing such new evidence as is available, including evidence bearing on petitioner's allegation which the United Staes Attorney denies and which is potentially critical to the disposition of the new trial motion that there was knowledge on the part of or wrongdoing by the prosecutors in connection with false testimony by Leuci."

A Yes, I am familiar with that statement. I stand by that statement, by the way, as I sit here now.

Q I am not asking you whether you stand by it. I am asking you whether you were familiar with that statement?

A After I read it, I was familiar. When I read

the Solicitor's brief, I don't know. I do know I read it at some time prior to handing it up to Judge Bauman on. I think, May 28th, 1974 but that's a matter of record. The brief was filed when. May 7th or May 8th?

Q No, thereafter. Some time, I think, about a week later, if I am not mistaken.

A From some time during mid-May to May 28th I read the brief.

Q Okay.

Now, you were therefore aware --

A No, I would say actually I read the brief a couple of days perhaps before May 28th. It's late May. I think we picked up a copy of the brief in Washington.

Q You were therefore aware that the United States Government in the Supreme Court had characterizaed evidence that there might be knowledge on the part of the Government in connection with false testimony by Leuci as potentially critical to the disposition of the new trial motion?

MR. JAFFE: Objection.

THE COURT: I will permit it.

A Yes. The thrust of that is, of course, not referring to -- well, go ahead. Develop what you want to.

Q Fully answer it any way you like.

A I think your allegation, Mr. Dershowitz, that the Goe memorandum was somehow representing prosecutorial misconduct is outrageous. That statement refers to the prosecutors in the case. It is absolutely clear that Mr. Morvillo and Mr. Sagor, myself, had absolutely no knowledge about the $50 at the time that case was tried. Or the Government having such knowledge, might be of some significance.

The fact that the Goe memorandum was in Government files does not support any allegation that there was any mala fide on the part of the prosecutors. Were such mala fide on the part of the prosecutors, your point might be well taken. Since there was none, since the Goe memorandum was absolutely trivial, that statement in the brief of the Solicitor General is absolutely correct and represents the point in opposition to the one you are making, which was totally unsupported, remains totally unsupported that the Government acted improperly, given the allegations against Detective Leuci, that there is absolutely no shred of evidence in this record as we stand here now that the Government acted improperly and that's what you told the Supreme Court of the United States that you were going to prove at this hearing, that's what you promised the Supreme Court you were going to prove, and you haven't done it,

Mr. Dershowitz, in my opinion as I sit here now.

Q Would you go back and look at that sentence and read the words, before the word "or", and the words after the word "or", that there was knowledge on the part of, or wrongdoing by the prosecutors in connection with false testimony by Leuci.

Does the word "or" appear there?

A Yes.

Q Was it not the Government's position in that brief that what would be critical would be either wrongdoing or knowledge of false testimony given --

A On the part of the prosecutors.

As you well know, Mr. Dershowitz, there is an entirely different standard between what a prosecutor standing in the courtroom knows to be false testimony and the concept that although the prosecutor doesn't know this false testimony, some Government agency unknown to the right hand has information which arguably is in conflict with the testimony, and you well know there is a different legal standard which attaches.

Lack of knowledge on the part of the prosecutors associated with the case of information in Government files is an important consideration.

Q Now, since you talked as a lawyer, is there any

support for the proposition in law that knowledge by the prosecutor's office, as an office, not a particular prosecutor, is legally relevant to any determination going to a new trial?

MR. JAFFE: Objection. We are not in a legal discourse.

MR. DERSHOWITZ: I didn't think so either. He has had a full opportunity to discourse on that.

THE COURT: Sustained.

Q Turning your attention to Footnote 3 that appears on the bottom of page 10 in that same brief, may I read it to you:

"The absence of knowledge by the prosecution of Leuci's other criminal activities would render them inadmissible for impeachment purposes --"

THE COURT: Excuse me.

Read that again.

Q "The absence of knowledge by the prosecution of Leuci's other criminal activities would render them inadmissible for impeachment purposes since they would not have given Leuci an incentive to testify favorably to the Government if the Government was unaware of them."

Are you familiar with that?

A Yes.

Q Are you aware of the fact that the word Government was used and that the word prosecution was used and no reference is made in that footnote at all to particular prosecutors who tried the case?

A Well, that's the only relevant aspect of the whole thing, Mr. Dershowitz. The prosecutors who tried the case.

Q Are you telling us that as a matter of law the only legally relevant matter is whether the prosecutors who tried the case had specific knowledge of Leuci's wrongdoing?

MR. JAFFE: Objection.

THE COURT: I am going to permit that.

You may answer.

A For certain kinds of misstatements on the stand by a witness, that is exactly true.

Under Giglio against the United States, if there are promises made of a witness by one office and not known to the other office, yes, a promise made by one Government branch is attributable to another.

For other kinds of situations where one Government agency knows something that another Government agency does not, the standard is entirely different, under the

Kehogh case.

Q If you were a defense attorney, would you regard it as a frivolous argument to make that if knowledge by one U. S. Attorney, there was knowledge by one U. S. Attorney of facts which would have led another U. S. Attorney in the same office, if he knew about it, to know that the testimony was false, would you as an attorney find that that argument was a frivolous one?

MR. JAFFE: Objection.

Q For some things yes, Mr. Dershowitz.

THE COURT: Sustained.

Q Are there any reasons --

THE COURT: Mr. Sagor, he made an objection. Why don't you comport yourself as you would like your witnesses to comport themselves.

Q Are there any legal purposes for which the knowledge by one Assistant United States Attorney of information inconsistent with testimony given at trial before another Assistant United States Attorney would be relevant?

MR. JAFFE: Objection.

THE COURT: Sustaine.

Q Okay. Let's turn a little further on into the chronology.

On May 28th of 1974, you will recall that a

motion was made before this very Court seeking to interview Mr. Leuci, do you recall that?

A Yes, sir.

Q Do you recall at that time that a statement was made on the record of this case indicating that we would like to bring to the Supreme Court all possible information regarding Mr. Leuci's possible criminality?

A What your statements are, Mr. Dershowitz, are a matter of public record.

Q I am asking you whether you recall the statements being made?

A I recall that you were --

THE COURT: I remember them being made. It was in that context the letter was written to the Court and that I authorized it to be made available to the Solicitor General, so he would have the option of presenting it to the Supreme Court of the United States. Those are the facts in that connection.

Q Now, do you recall during that proceeding, and a proceeding which followed on the next day, repeated reference of the case of Mesarosh versus the United States?

A I recall the Mesarosh case was cited, yes.

Q Do you recall that at one point his Honorable Judge made a ruling indicating that we should be given as

much information as the Government possibly could, consistent with obligations of secrecy, so that we might do what we had to do with it and bring it to the attention of the Supreme Court?

A Judge Bauman's comments don't need any characterization.

Q Do you recall that on May 28th , Mr. Jaffe was asked to prepare such a letter and --

A Mr. Dershowitz, I'm familiar with the record. Get to a question. Don't sit here --

Q On May 29, the Judge read the letter and indicated it would not be turned over, whereupon a mandamus proceeding was --

A Do you want me to testify as to what Judge Bauman did on the record?

Q I am asking you, to your recollection, the incidents of --

THE COURT: I remember them clearly.

Go ahead.

MR. DERSHOWITZ: We are getting to one point, with all respect, your Honor, when you weren't there.

Q Were you present during an argument in the United States Court of Appeals for the Second Circuit on the day of May 29, 1974, on a petition of writ of mandamus?

A Yes, I was.

THE COURT: Let the record indicate I wasn't there.

Q Do you recall a question put to me by Judge Weinfeld from the bench as to whether or not the Government had any knowledge prior to trial of any information inconsistent with Leuci's testimony at the trial?

A I'll tell you what I do remember Judge Weinfeld asking. Maybe that will help.

Do you want me to answer?

THE COURT: Go ahead.

A (Continuing) Judge Weinfeld smiled at you and asked didn't Leuci admit to substantial misconduct on the record? Didn't he say that to you?

Q I think he did, yes.

A Thank you.

Q Do you recall whether or not --

THE COURT: Wait a minute. You are supposed to be answering the questions.

Go ahead.

Q Do you recall whether he also asked whether or not there was pretrial knowledge by the prosecution of any information inconsistent with Leuci's testimony on trial?

A I don't remember.

Q Do you recall him saying, Mr. Dershowitz, isn't it required in order for you to get a new trial, either in the Supreme Court or in the District Court that you be able to allege and establish some knowledge by the Government of information inconsistent with Leuci's testimony at trial?

A It's possible he did. I just don't remember.

Q At the time that the hearing was going on in your presence, did you have in your mind knowledge that the Goe memorandum existed?

A As of May 28th?

Q Yes.

A Yes. I testified to that.

Q As you were sitting in the United States Court of Appeals and listening to Judge Weinfeld questioning and listened to that argument, were you aware of the existence of the Goe memorandum?

A Mr. Dershowitz, what was in my mind, I'll tell you -- do you want me to tell you what was in my mind?

Q Please answer the question, Mr. Sagor.

A I can only tell you what was in my mind.

Q Yes.

A What was in my mind, it had to do with the fact

that you were getting accorded special treatment in the Courthouse by virtue of your position; that the Court of Appeals, if they listened to ordinary defense counsel, would have given short shrift to your mandamus and I felt the Court of Appeals was giving great respect to a Harvard Law Review professor, to listen to that, and you had alleged in your petition that Judge Bauman had acted beyond all reason in denying your request for the May 29th letter and that was the only thing in my mind, how outrageous I thought it was they were giving you an accord of a 15-minute argument on a petition for mandamus.

The Goe memorandum was the furthest thing from my mind, and still is. As we wrote in a 41-page brief, it is absolutely de minimis, a footnote to the importance of the motion of the other legal questions that you are raising in this new trial motion.

THE COURT: What happened to that mandamus petition?

THE WITNESS: They denied it, your Honor.

THE COURT: From the bench?

THE WITNESS: From the bench.

Q At the time they denied the mandamus from the bench, was the United States Court of Appeals informed of the existence of the Goe memorandum?

A No, they were not informed of the existence of the Goe memorandum.

THE COURT: I do intend to reserve decision and give you an opportunity to submit briefs, but I have no hesitancy stating now that I regard that Goe situation as de minimis, quite aside from the fact of whether since it was in the possession of a branch of the enormous United States Government, knowledge was attributed to the individuals who were prosecuting that case. I regard it as de minimis because the three or four situations Leuci talked about at the trial made $50 worth pale into insignificance. That's my finding on that point.

Q Mr. Sagor, just referring to that specific issue, is it not true that Mr. Morvillo at the trial at which you attended, stated to the jury that as hard as Mr. Krieger, this eloquent lawyer, tried, he could not find Leuci telling one single silitary lie, not one single solitary lie.

MR. JAFFE: Objection. The record speaks for itself.

THE COURT: I don't quite understand what this has to do with what we are here to discuss.

MR. DERSHOWITZ: May I mention that, your Honor?

THE COURT: Yes.

MR. DERSHOWITZ: Mr. Morvillo, at the trial,

said Mr. Leuci had not been caught in one single solitary lie. Had this material been turned over to the defense had had Leuci testified as he testified, and had he been confronted with the Goe memorandum, it would have been established that he had committed perjury in the presence of the jury. That is not a de minimis or trivial matter.

THE COURT: I regard it as such.

Go ahead. Since you are talking about what the jury may have thought, if Leuci had been caught in an "error or two and outright lie", let's understand what happened at the trial was that when your client took the stand, he admitted the guts of the allegations against him. He asserted a defense of entrapment, which the jury rejected, but he admitted, and I have recently reread his direct testimony, having bought and paid for documents to which he had no right. So, don't tell me please what the jury might have found or not have found based on some $50 payoff.

MR. DERSHOWITZ: It seems to me, your Honor, the issues as put by the Government were the credibility of Leuci versus the credibility of Rosner on the important issue of entrapment, which the Supreme Court has --

THE COURT: Go ahead and prove that the Government deliberately suppressed evidence in the Supreme Court

of the United States.

Q Do you recall on what day the United States Supreme Court denied petition for writ of certiorari?

A You would know better since you made a phone call to the Clerk of the Supreme Court, Mr. Rodack, to ask about the denial but for the record, it's June 10, 1974.

Q Up until June 10th, 1974, had you informed me of the existence of the Goe memorandum?

A Up until June 10th? I don't know, Mr. Dershowitz. I know we have often had chats. I truly don't remember. But, if you will say that I did not, I will accept that. I do know I put it in an affidavit in connection with your motion for discovery. I have no recollection as I sit here now of telling you in one of our telephone conversations, chats about the Goe memorandum. I kind of think I did not, but I would never make any absolute statement of what I did or did not tell you on the telephone without checking notes.

Q Would You check your notes?

A Would I check my notes?

Q Yes, right now, to resolve all doubts about that.

A If you tell me, Mr. Dershowitz, as to that I will accept your statement.

Q I would like you to check your notes, please.

MR. JAFFE: While that is going on, your Honor, let the record reflect I am going to hand over to Mr. Dershowitz Government Exhibit 13 for identification, the excused copy of the May 28, 1974 letter from our office by me to you.

MR. DERSHOWITZ: May I have one moment, your Honor?

THE COURT: Yes.

Marshal, I want only members of the working press in the second row on that side, please.

THE MARSHAL: He is from Harvard Review.

THE COURT: Young man, you may sit there.

MR. JAFFE: Your Honor, may I have a minute to confer with Mr. Sagor unrelated to his testimony?

THE COURT: Yes.

A I think the pending question was do I have a notation in my file of a conversation with you. Let me check further.

No, I do not find a notation. I will take it, for purpose of the record, that you were first notified of the Goe memorandum in the Government's affidavit of June 19th, 1974.

MR. DERSHOWITZ: Would Mr. Jaffe be prepared to make such representation since he was a party to that

proceeding?

MR. JAFFE: If you will defer just a moment, I'll give you an answer.

Your Honor, we will state for the record that the affidavit as dated there is a matter of public record, and that's what the record will reflect in this case.

Q Do you recall my reaction to having received the information relating to the Goe memorandum?

MR. JAFFE: Objection.

THE COURT: Let me answer that.

MR. JAFFE: No. I object.

THE COURT: I think I would like to hear it.

A Mr. Dershowitz, the answer is, I don't remember specifically, but I could tell you what it was because whenever I speak to you, your reaction is hysterical, so I assume it was hysterical.

THE COURT: Strike it out.

Q Do you specifically recall my reaction being told --

A When you were first shown the Goe memorandum?

Q Yes.

A Well, when did I show it to you, on the return date, were you in the company of Miss Baker and you had a cast around your neck having fallen from a chair?

Q That was the time.

A Was that the time I gave you the extracted version of the Goe memorandum?

Q Yes.

A I think you said "We're going to win on this one."

Q That's right.

Do you recall me saying this does it, this puts us over the top, this is the first hard evidence that we have of Government knowledge?

A Do you recall my laughing?

MR. JAFFE: Excuse me. The Judge --

THE COURT: There is nothing humorous about this. I want that thoroughly understood on all sides.

Mr. Dershowitz has made a serious charge and I considering, one, whether or not he is in a position to prove it and, two, if he is not in a position to prove it what I should do about the charge that he has made in that event irresponsibly., There is nothing funny about that and I want that thoroughly understood. At the end of this, I want Professor Dershowitz to tell me how he has proved this dreadfully --

MR. DERSHOWITZ: I am prepared --

THE COURT: Please, don't interrupt me.

Should he fail, I will then consider what disciplinary steps to take.

MR. JAFFE: I was going to say, your Honor, I object to that last question. It is not Mr. Dershowitz' testimony that matters. If he wants to testify, he can testify. I don't think Mr. Sagor should be asked what Mr. Dershowitz said.

THE COURT: Let's assume Mr. Dershowitz' reaction was, "It puts us over the top."

Q Can you recall when you first confronted Mr. Leuci with the Goe memorandum?

A Yes. I think I spoke to Mr. Leuci that very afternoon on April 9th, 1974.

Q Were you in court when Mr. Leuci testified that at the time you showed him that Goe memorandum, you said it was terribly significant and you were already on the third story?

A I remember he said something, "What idiot knew about this" and I was annoyed.

Q Did you say something about already being --

A I think that was --

Q Do you recall him saying that?

A I recall him saying that.

Q Did you normally go on the third story about

trivias, de minimis matters?

MR. JAFFE: I object.

THE COURT: Sustained.

Q Did you at that time regard the Goe memorandum as trivial and insignificant?

MR. JAFFE: Objection.

THE COURT: Sustained.

Q At the time --

THE COURT: I will let you answer that.

Did you regard that as trivial?

THE WITNESS: Yes, absolutely, and I can tell you why I was annoyed.

THE COURT: I want to ask you.

Go ahead.

THE WITNESS: I was annoyed because I never saw it and I realized that if it were true, that would be silliness on someone's part, someone failed to tell prosecutors in the case, myself and Mr. Morvillo about the $50 incident. It was absolutely clear had we known Detective Leuci's memory would have been refreshed and he would have testified to that conduct, which he already admitted to and I was embarrassed because I take my respons-ibilities very seriously and there should be absolutely no slip-up in connection with the prosecution of any case in

this Courthouse, and I was annoyed. But, I considered the Goe memorandum absolutely trivial, since the prosecutors did know and since there was a matter of $50 involved. I also considered it trivial at that point because when I first spoke to Detective Leuci, he remembered having said it, but he didn't remember whether or not at the time it was indeed true. That's why in the footnote to the Government's affidavit, I did not respond to the Court and bring it to the Court's attention because I had no knowledge then as of the date that I was supposed to respond to the affidavit, that the allegation in fact was true, that Detective Leuci in fact had committed an act of misconduct.

Q Did you at any time discuss the Goe memorandum and its contents with other Assistant United States Attorneys?

A Yes.

Q Can you tell me with whom you discussed it?

A I would say that I discussed it with -- when it came to my attention after April 9th, you mean?

Q If you can tell us who you discussed it with before that time --

A Obviously I can't. Do you have time frame in mind?

Q Can you tell us everybody in the United States

Attorney's office with whom you discussed the Goe memorandum?

A I discussed it with Mr. Giuliani, Mr. Jaffe, Mr. Glekel, Mr. Grdon, I discussed it with Mr. Curran, I discussed it with Mr. Shaw, who is not in the United States Attorney, and I discussed it with Mr. Scoppetta.

Q Anyone else?

A Mr. Feinberg, possibly more.

Q Did you ever have a discussion with anybody in the U. S. Attorney's Office as to whether or not there was an obligation to disclose the Goe memorandum?

A Sure.

Q Did you ever have a discussion with anybody in the United States Attorney's Office as to whether you had a continuing obligation to disclose it?

A Well, whether we had a continuing obligation, it was obvious to me at some point we are going to have a hearing in this case. It was always unclear, given the pendency of the Supreme Court and the motions you were making, when the hearing would take place. It was perfectly clear when it came time for another affidavit in connection with the case, the government would respond, which the government did, bring it to the attention of the court.

It is absolutely, in my judgment as I sit here now, a totally small point, nothing that required, sua sponte, immediately to come rushing up and file a paper in this court. I may be wrong about that but that's how I feel inside.

Q Were you aware that the Solicitor General, in

his brief in the Supreme Court,addressed himself to the possibility that the court might consider under the principles of Masorosh taking it and making its own decision as to whether a new trial should be granted?

A That was one of the three proposals I think the Solicitor General suggested, yes, the court rejected.

Q You at the time didn't know the court had rejected that proposal, did you?

A At the time the solicitor made it?

Q That's right.

A How would that be possible?

Q You were aware of the three possibilities proposed by the Solicitor General to the United States Supreme Court, one of them included the possibility that the United States Supreme Court might consider and dispose of the new trial motion under the principles of Masorosh?

A Well, to answer your question fully, which I'm sure you want me to do, you are asking a very hypothetical question, query. Supposing the Supreme Court of the United States decided to decide this matter on papers before it, at that time they didn't have all the facts before it; they didn't have the debriefing Detective Leuci had, they didn't have the particulars of my investigation surrounding who knew about the Goe memorandum and when

and if the Supreme Court was going to make its own determination those factors would be presented to the Supreme Court. So the Solicitor General's statement obviously is incomplete, as you well know, as to the details of all the admissions Detective Leuci admitted to.

Q Did there come a time when you had a discussion with anybody in the United States Attorney's Office as to when you should disclose the Goe memorandum to the defense?

A Yes.

Q Can you tell us with whom you had that discussion?

A Yes. I had that discussion with Mr. Glekel.

Q When did you have that discussion with him?

A Well, I had the discussion with Glekel, who was recently assigned in connection with the hearing. In briefing him in connection with the hearing I had a recent discussion with him where I told him about the legal problems that we are going to anticipate in the hearing, and I mentioned the Goe memorandum and suggested we bring it to the attention of the court at the first appropriate time.

Q In your discussions with Messrs. Gordon, Giuliani, Jaffe, Feinberg and whoever else you mentioned,

other than Mr. Glekel, in all your discussions with these assistant United States attorneys, did the issue ever once arise as to when you should disclose the Goe memorandum?

A No. It was considered by all people and concurred in my view that given the admissions of Detective Leuci and even apart from the admission of Detective Leuci, even if we didn't have that issue in the case, the Goe memorandum was absolutely de minimis, nothing calling for the government to ruch in immediately and file a report to this court. I may be wrong about that but that was my view.

Q Was there then absolutely no discussion at all that you might -- any discussion at all about --

A That is correct, and I take full responsibility for that decision as the assistant primarily in charge of this casein April, 1974. Of course, I have not had any real charge in connection with Detective Leuci's debriefing, conducted by others.

Q Specifically, you had a discussion with Mr. Gordon?

A Yes.

Q And in your discussions with Mr. Gordon you obviously as you said discussed the Goe memorandum?

A Yes.

Q You also discussed what you had disclosed to the Solicitor General and what he might disclose to the Supreme Court?

A I don't think so. My discussion with Mr. Gordon, as I remember, was always to discuss legal problems and tell him what was happening, and I discussed the Goe memorandum, that it was not my judgment to discuss with him what or what not he should tell the Solicitor General. I have an expectation of what he told the Solicitor General but I really don't want to speculate as to whether he did or did not.

Q Did your discussions with Mr. Gordon include any discussion as to whether or not you might consider telling us about the Goe memorandum?

A No.

Q There was no such discussion?

A No, such discussion.

Q Was there ever a time during the pendency of the May 28th, May 29th proceedings in which we were seeking in court, both the District Court and the Court of Appeals, all information necessary to make the fullest possible presentation to the Supreme Court -- was there ever a time during that two-day period or thereabouts that you considered that it entered your mind to consider turning

over the Goe memorandum to the defense?

A Quite frankly, absolutely not, given the admission of Detective Leuci. They were sent up in a letter about taking money from seizures, giving narcotics to junkies and other such things, and that admission of the $50 from the seizure is incorporated in all the categories of misconduct. So as far as categories of misconduct, you had it. Obviously, as you well know, it would be inappropriate to raise to the Supreme Court the question of what the prosecutors knew when in connection with the Goe memorandum, and it was obviously something to be considered by the District Court and is being considered by the District Court now.

THE COURT: And it has been.

A And it has been.

Instead of your leveling a great charge against the government for doing it, I will take it; as far as not bringing it to the attention of you on May 28th and 29th, don't blame the United States Attorney's Office, blame me.

I think I am blameless as I sit here but --

THE COURT: I have forgotten now, but what was the rough amount of money that was involved in Leuci's testimony at the trial, in the three or four instances

that he admitted having committed some wrongdoing. It seems to me I have a recollection one transaction involved $4000.

THE WITNESS: I thought it was $10,000. That would have been the total.

THE WITNESS: I think Detective Leuci said 5000 or perhaps more, but I think at the trial the figure was 10,000.

MR. DERSHOWITZ: It is our representation the figure was closer to $5500.

Q As an experienced lawyer, do you not see any difference between crimes that the government learned about after trial and crimes that the government learned about prior to trial? Is there no difference whatsoever?

MR. JAFFE: Objection.

THE COURT: Overruled.

A There is a difference.

Q So therefore the material contained in the Goe memorandum could not as a matter of practical legal significance be put as one of a small category of other crimes.

MR. JAFFE: Objection, your Honor. We are getting back into a nice legal argument and that can be had without Mr. Sagor on the stand.

THE COURT: I want to give Mr. Dershowitz every opportunity to prove a serious charge. If he doesn't I will have to decide what I am going to do about that in terms of suggesting possible disciplinary proceedings, so I want to give him every opportunity to prove that allegation because if it was improperly made I for one will see to it that it does not go unchallenged in the appropriate place.

Go ahead.

Q Do you understand, Mr. Sagor, that there is a significant legal difference for some purposes between information that the government had prior to trial and information which the government learned subsequent to the trial?

A If you are asking me the hypothetical question whether in some cases --

Q I am asking you the actual question, whether there is a difference in law between --

A The answer is sometimes, Mr. Dershowitz.

Q Returning for a moment to April 30, 1974, the time when the Solicitor General was first apprised, according to the government --

A I'm not sure, Mr. Dershowitz. I think it's on that date. I think it may be that it was mentioned in

the proceedings here. As I say, I was not there. That's a date that sticks in my mind, as a date Mr. Gordon called the Solicitor. I believe that to be correct. It could be a few days earlier.

Q Or later?

A No. I think April 30th is an outside date.

Q Would you recall that on May 6th, I think it was, this court ordered the government to produce, to send to the Solicitor General's Office, the information?

A Yes, but that had already been done. Looking at that transcript at one point, I know that Judge Bauman suggested to Mr. Curran -- I forget Mr. Curran's response but I do know whatever the court's direction was in that case, it had already been accomplished.

Q Do you recall when the Supreme Court was scheduled originally to act on a petition for writ of certiorari before the new information was brought before it concerning the Leuci allegation?

A Probably not, but I do know you know that because you spoke to the clerk of the Supreme Court. I do not have that information.

Q Was I not in constant, repeated contact with you, telling you about the status of the certiorari petition

because of the pending stay of the mandamus and the --

A I remember discussion with you during that period. I do know you were speaking to Mr. Gordon too and he is a better person to ask about it.

Q We wish we could. He is out of the country, we hear.

A Had you advised us of this we could have made provisions to have him here.

THE COURT: When will he be back?

THE WITNESS: I don't know, your Honor.

MR. DERSHOWITZ: We would like to call him in time for this hearing.

THE COURT: I will see he returns in time.

THE WITNESS: What's your question?

THE COURT: During the recess I should like you to find out when Mr. Gordon will be back.

MR. JAFFE: Judge, as far as we know, he has been on business, not on vacation.

MR. GLECKEL: Official business, your Honor, overseas. At the earliest he may be returning to this country some time early next week.

MR. JAFFE: Do you want us to have him --

THE COURT: We will put it down for a week from Monday, if he is on official business.

Go ahead.

BY MR. DERSHOWITZ:

Q To your knowledge, at the time that the Leuci revelations were first made to Mr. Jaffe, to Mr. Giuliani, to Mr. Puccio, was it the intention, as expressed in the legal document of the United States Attorney's Office, not to make that information public for a specific period of time thereafter?

MR. JAFFE: I have two objections. The first is the statement in that question assumes a fact not in the record. The first disclosure was not made to the three people, it was made to Giuliani and to Puccio.

MR. DERSHOWITZ: Fine.

THE COURT: Will you reframe the question, please.

Q To your knowledge, do you have any knowledge as to whether or not at the time when the original disclosures were made to Mr. Giuliani, Mr. Jaffe and Mr. Puccio, general disclosures, on the 17th and 18th, whether it was the intention of the United States Attorney's Office not to make that information available for a particular period of time?

A You mean the details of Leuci's allegation.

Q The fact that any such allegation were made?

A I think Mr. Curran wrote this court a letter which I would like to read. Would you like me to read it? I think to answer your question in part, yes, we had the information that the Baron's allegations in his affidavit are perjurious, that we had every reason to believe that they may well be matters of subornation of perjury involved in connection with the Baron's allegation, and frankly I want to investigate that further. So to some extent the government probably did want some delay in connection with this hearing and I understand, as you know now, we are not going to hear from Mr. Baron Lawrence from the witness stand. I would like to read the letter.

Q Let me clarify that first. Are you suggesting that the reason you want a delay in reviewing the Leuci material had to do with the Baron's affidavit?

A No. What I'm suggesting to you is that there was a feeling in the United States Attorney's Office for some delay in connection with the hearing. That may well be some secondary benefit to Leuci's revelations because the office may well want an opportunity to investigate further what the office considered perjurious statements in the Baron's affidavit. At any rate, that was not a controlling factor and there was no notion whatsoever of withholding from defense counsel in this case the Leuci revelations, so called.

At any rate, as you know, Mr. Curran soon after wrote a letter to this court and I'm going to read that letter.

Q I did not know it at the time.

A No, but it was shown to you, Mr. Dershowitz, not made part of the public record in this case.

Q Several weeks, perhaps over a month later. That is, at the time the letter was sent I had absolutely no knowledge ---

THE COURT: I believe I sealed it.

THE WITNESS: Yes, you did, your Honor.

MR. DERSHOWITZ: And may the record reflect we received no notification any such letter had been sent --

THE COURT: That's customary when a document is dealed.

A As you know, Mr. Dershowitz, on April 23, 1974, Mr. Curran handed up to Judge Bauman the following letter addressed to the Hon. Arnold Bauman, United States District Judge --

THE COURT: What's the date again?

THE WITNESS: April 23, 1974.

A -- United States Courthouse, Foley Square, New York, N. Y. 10007. Re: United States against Edmund Rosner, 72 Criminal 782:

"Dear Judge Bauman:

"The defendant's application for relief in the above case, which is now before your Honor, involves a claim that Robert Leuci testified falsely at the trial and that the government was then aware of this.

"This is to inform the court that for the first time last week Mr. Leuci told the government of certain criminal acts committed by him when he was a member of the Narcotics Division of the New York City Police Department, about which Mr. Leuci did not testify at the trial

of Edmund Rosner.

"I stress that none of this activity was or could have been known to the government then. Moreover, these activities, as detailed by Mr. Leuci himself, do not involve the allegations made by the defendant in the instant application nor does this new information affect the papers already filed by the government in opposition to the pending motion.

"The government is now conducting a full investigation in all of Mr. Leuci's recent disclosures and I assure you that this inquiry will be as expeditious as possible. In addition, it would appear that there is a serious reason to question certain sworn statements of 'fact' in the defendant's motion papers and this is also being investigated."

Page 2 of the letter reads:

"Justice to all concerned requires that the government have all the facts before a full assessment of this matter can be made. For that reason, and because of its broader implications, I believe that this investigation should be conducted and, if possible, fully concluded before any further proceedings are held on the instant motion. Accordingly, we request that any argument or hearing in the above matter be adjourned for a reasonable

"I believe that disclosure of the contents of this letter at the present time would jeopardize the investigations which are just beginning and could well jeopardize Mr. Leuci's life. Accordingly, I also respectfully request that this letter be made a part of the record in this case and that it be ordered sealed."

Q May I see that letter, please?

A Certainly.

MR. DERSHOWITZ: Defendant moves for the admission of that letter into evidence.

THE COURT: Received. It's all been read into the record but it's received.

MR. DERSHOWITZ: I would like to read one portion of it on the first page.

MR. JAFFE: May we mark that as the next government's exhibit, please.

THE COURT: All right. We are going to take a recess in a few minutes.

(Government's Exhibit 14 was received in evidence.)

MR. DERSHOWITZ: Before the recess, may I just read this and ask one question?

THE COURT: Yes.

I have already said I ordered it sealed and I

believe it was delivered to me personally.

Q May I read the following statement from the letter of April 23rd:

"I stress that none of this activity was or could have been known to the government then."

Do you recall reading that?

A That's in connection with Leuci's recent admissions, Mr. Dershowitz.

Q I understand that. Do you recall reading that line in the letter?

A Yes, I do.

Q At the time you read that line in the letter were you aware of the Goe memorandum?

A I didn't write the letter, Mr.Dershowitz. The question is whether Mr. Curran was informed, if he was, and I don't know that he was.

Q I ask you whether you read this letter.

A Did I read the letter?

Q Yes.

MR. JAFFE: He just read it.

Q Would you read the letter before it was submitted or shortly after it was submitted in secret to Judge Bauman?

A I did read that letter after it was sub-

mitted.

Q At the time you read the letter and that line in the letter, were you aware of the existence of the Goe memorandum?

A Yes, I was.

Q Were you aware that the government had in its possession at the time it sent this letter to Judge Bauman evidence indicating that there were federal agents and federal government people who knew about a crime that Mr. Leuci did not admit to at the trial?

A Mr.Dershowitz, this letter stands and is absolutely clear on its face.

Q Will you please answer the question. Were you aware at the time you read this letter --

A Mr.Dershowitz, I was aware of the --

MR. JAFFE: Mr. Sagor, don't argue with him, please.

I object to that question.

THE COURT: Answer it briefly.

A There is absolutely nothing inconsistent in that letter --

THE COURT: Were you aware of the Goe memorandum when you read that?

THE WITNESS: Yes, your Honor.

Was I aware of the Goe memorandum when I read it?

THE COURT: Yes.

THE WITNESS: To the extent I knew about the Goe memorandum on April 9th. I was aware of the Goe memorandum.

Q Now, you have testified extensively that the Goe memorandum pales in significance to the subsequent matters admitted to by Robert Leuci.

THE COURT: I said that.

MR. DERSHOWITZ: I think the witness did too.

Q At the time that you first read the Goe memorandum were you aware of Leuci's other admissions that he made to Mr. Jaffe and Mr. Giuliani and Mr. Puccio on April 17th?

A Absolutely not.

Q So at the time you first came upon the Goe memorandum and read it you did not know of any other crime committed by Mr. Leuci that he had not admitted to at trial?

A The point --

Q Would you answer yes or no.

A I cannot because you are putting am ambiguity

in this case and you know full well. There are admissions of Leuci at the Rosner trial and there are admissions of Leuci as of April 17th. You are confusing the two purposely.

Q I am asking you on April 17th.

A On April 9th, when I thought in my mind it was trivial, I was thinking of Leuci's admission at the Rosner trial.

With respect to Mr. Curran's letter you knew full well that the admissions in Mr. Curran's letter refer not to the admissions in the Rosner trial but to the admissions he made to Mr. Giuliani and Mr. Puccio on April 17th.

Q May I repeat the question --

THE COURT: No, I happen to think Mr. Sagor is right. It's apparent from the letter he is not talking about the admissions that were made at the trial. Certainly I read the letter as indicating that Leuci -- and I was the recipient of the letter -- that Leuci was now telling him things he didn't know about his previous criminal conduct and in substance he wanted to investigate that before the hearing this matter proceeded.

MR. DERSHOWITZ: That's entirely consistent with our argument. Our argument is that on April 9th,

when Mr. Sagor, learned about the Goe memorandum, he did not have in his possession any evidence whatsoever that Leuci had lied in any respect about his prior criminal record. The Goe memorandum was the first crime brought to the attention of Mr. Sagor which was not admitted to at trial. I would like to establish that in the record.

THE WITNESS: You cannot establish it as of April 9th, Mr.Dershowitz, because Mr. Leuci told me, as you will remember from my testimony, that he was not sure when I first spoke to him that he had in fact done it.

Q Were you aware on April 9th that Mr. Leuci admitted to federal officials that he had done it?

A He had said to federal officials that he had done it. He also told me that he had an emotional session with them when they were accusing the New York City Police Department of everything under the sun and he had indicated about a situation involving federal officials. Whether it actually occurred or not that he himself had received $50 or not, that he wasn't sure of, and he was on the run and I was on the run to get finished with the thrust of the affidavit which were the Baron's allegations.

Q But the important matter that I think we have to bring out is at the time you first read the Goe memorandum

at the time you first read the Goe memorandum, you did not have in mind the massive evidence of crimes which were later admitted to by Robert Leuci?

A That is correct.

MR. JAFFE: I object to the form of that question.

THE COURT: The witness answered that's correct and we will now take the afternoon recess.

(Recess.)

BY MR. DERSHOWITZ:

Q Mr. Sagor, if it were to turn out tomorrow Mr. Leuci would come to you and tell you he has admitted yet another crime involving $50 which he had not yet testified to two days ago would you feel it was your obligation to turn it over to defense?

MR. JAFFE: Objection.

THE COURT: I said four times I will not permit hypothetical questions. Sustained. I now say it for the fifth time. Sustained.

Q Do you consider it your duty to turn over to the defendant any subsequent admissions of crime that Mr. Leuci may make?

MR. JAFFE: Objection.

THE COURT: Sustained.

Q Did there come a time this year when you learned about the existence of tape recordings made of the Baron by Mr. Rogers' office?

A Yes.

Q Did you learn that they contained detailed allegations of various charges made against Detective Leuci?

A I think you may have told me that, Mr. Dershowitz.

Q Did you learn -- did you ever hear the tapes?

A Let me -- do you want me to explain what happened?

Q Yes.

A Sure.

There came a time when Mr. Rogers sent us, on his own motion, I think some time June 13th or so, a tape recording, one tape of a conversation between Mr. Cunningham of his office and Mr. Baron and maybe some other investigator. I did listen to a part of that tape recording. Much of the speech on the tape recording was indecipherable to me.

Q At the time when you turned over the Goe memorandum to us had you made a decision whether you were going to turn these tapes over to us or make us aware of their existence?

A Did I have the tapes -- which day did the government file its affidavit, Mr. Dershowitz?

Q June 19th, 20th.

A I don't know when I physically received the tape. It would not be my expectation to turn over the tape recordings to you. Whatever use we were going to make of the tape recordings was in cross examination of the Baron. The tape --

Q You do not --

A I asked Mr. Rogers whether there was anything -- why he was sending me the tape recordings. He said in connection with the hearing. I said what is on the tape recordings. He said a conversation with Mr. Cunningham and the Baron that he thought we should have. I didn't listen to the tape recordings and it was our intention, if possible,, some time to cross examine the Baron from the tape recordings. You got the tape recordings because Detective Leuci told you in his interview that he had heard a tape recording with me and the government consented to turn over the tape recordings to us.

Q But it was not your intention to disclose to us the existence of those tape recordings until the Baron testified?

MR. JAFFE: Objection. Asked and answered.

THE COURT: Go ahead.

A I knew about one tape recording, and having not heard the tape recording it was not my expectation of turning it over to you.

I asked Mr. Rogers whether there was anything on the tape recording of significance. If he told me there was something of significance that would have helped you I would have turned it over to you. You knew the tape recordings were no secret. Mr. Leuci told you of it and the government consented to turning it over to you. Indeed, the government volunteered and told you -- Mr. Oppenheim from Mr. Rosner's office -- that there were additional tape recordings. When we learned there were additional tape recordings we told Mr. Oppenheim, who wanted to listen to the one tape recording.

Q But you did not tell us about the existence of the tape recording until such time as Mr. Leuci volunteered the fact that those tape recordings existed?

A No, the tape recordings put the lie to Mr. Lawrence in Miss Baker's affidavit; Mr. Lawrence said that he had given a tape recording to Mr. Sherman in January, 1973. From what we could determine, Mr. Sherman never received

any tape recording from the Baron, any tape recordings made by Mr. Rogers' office was made in March, so it is absolutely impossible for the Baron to make the allegation that the United States Government, through Mr. Sherman, had tape recordings which did not exist in January, 1973, and our interest in the tape recordings was, among many things, to cross examine the Baron on them. My expectation was not to tell you about that tape recording because we expected to use that in conjunction with the Baron's cross examination.

Q Were you aware the tape recording contained a statement by Mr. Cunningham stating that the lie detector test administered to Mr. Baron was erroneous and improper and there was no way anybody could conclude that the Baron was telling a lie on the basis of those lie detector tests?

A Absolutely not. I do know what Mr. Rogers' office, filed in his affidavit, thinks about the allegations of the Baron, but I am not familiar with that statement of Mr. Cunningham.

MR. DERSHOWITZ: We would like to move the admission of that tape recording into evidence for your Honor to play if and when he thinks it appropriate.

MR. JAFFE: We object to that, Judge.

What somebody else thinks of some lie detector test is absolutely irrelevant. If we want to get into the subject of lie detector tests we can get into what they thought of all the other lie detector tests, if that happens to be on the tape.

THE COURT: How long does that tape recording take?

MR. DERSHOWITZ: Unfortunately, there are totally about six hours of tape.

THE COURT: That wouldn't stop you any. How much is important --

MR. DERSHOWITZ: I think the first tape is important for you to hear. I think the first tape indicates the clear consistency between the story told by the Baron to us and the story told by Mr. Rogers's office a year or so earlier and it also contains the allegations that I have just stated to the Court.

So it's one, basically one tape that would take probably 40 minutes to listen to, I think.

MR. JAFFE: Your Honor, our objection is if the defendant wants to have what Mr. Lawrence said as allegations put into evidence before this Court, Mr. Lawrence is available. They have assured us Mr. Lawrence will take the stand and now they have changed their mind and decided he wouldn't. We strenuously object to putting any statements by Mr. Lawrence into this court as evidence unless Lawrence gets up on the witness stand and subjects himself to cross-examination.

THE COURT: That is fair enough.

Sustained.

MR. DERSHOWITZ: May I make an offer of proof?

THE COURT: No. If you want to put that in, I will permit you to put it in or I will permit them to cross-

examine from it after you put Mr. Lawrence on the witness stand.

MR. DERSHOWITZ: May I not make an offer of proof?

THE COURT: Oh, make an offer of proof.

MR. DERSHOWITZ: Our offer of proof is then the Baron made allegations to Mr. Rogers in March of 1973 similar to allegations he had made in December and January to various other states and Federal officials.

THE COURT: December and January 1972?

MR. DERSHOWITZ: '72 and '73.

THE COURT: After the trial, after the verdict in this case?

MR. DERSHOWITZ: Yes.

THE COURT: Objection sustained.

MR. DERSHOWITZ: After the verdict and before the sentencing and we are not seeking to introduce Mr. Lawrence as to the present truth of his allegations on the ground that the present truth of much of his allegations have been confirmed by Mr. Leuci and Mr. Leuci is the best evidence of his own criminality, but simply to make a record establishing that these allegations were made back in December 1972 and January through March 1973.

THE COURT: Do you question that? You have

heard the tape, I take it.

MR. JAFFE: No, your Honor, I have not heard the tape. What I do question is the testimony at this trial, at this hearing is that Lawrence's allegations to the agents involved were nowhere near specific as Lawrence's present allegations and what Lawrence's allegations were between the time he first talked to Sherman in Nadjari's office and Roger's office and later told Rogers and later came forward in an affidavit and put them on paper and swore to the truth of them, are very inconsistent. They change. They become more and more and more specific.

Now, allegations exist all over the place. Taylor testified here that he talked to Lawrence as far back as '69 and we asked him, what do you know about involvement with corrupt police officers. He said absolutely nothing.

THE COURT: Listen, I have consistently ruled throughout the trial and in this proceeding that I would not permit or go into unproven allegations of criminal conduct. I don't see that this differs from any of the rest of it. Whether Lawrence said it or some other stool pigeon said it really doesn't make a great deal of difference. It is in that category.

One further thing. I am prepared at this time

to take this legal position, in that whatever Mr. Lawrence said was said after the verdict in the case, it could not possibly have affected the verdict in the case and I do not agree with Professor Dershowitz' contentions that simply because it was not available to them at the time he made his first new trial motion, that that should result in a setting aside of the verdict in which it could have played no part.

MR. JAFFE: Your Honor, may we make one further comment. That comment is this:

The Court has been given a series of allegations by Lawrence. Leuci was cross-examined by Professor Dershowitz. Leuci admitted two of the allegations, maybe three of the allegations that Lawrence made in his most recent affidavit. The other allegations are very, very -- well, they are allegations of specific crimes alleging that Leuci was a dope peddler in a long dope conspiracy with the Baron. The Baron is not here to testify to those. He is available to the defense but they don't want to put him on for whatever reason.

Now, we take the position that the failure to call Lawrence at this time, at this hearing, entitles us to have the Baron's affidavit stricken out and all the allegations stricken out and the only evidence of misconduct Leuci and the Baron is what Leuci admitted to because it

is absolutely outrageous that the defense be entitled to put in a series of what we believe to be false affidavits, have them sworn to and have hearings predicated --

THE COURT: It was merely on the basis upon which I granted this hearing. It is not in evidence.

MR. DERSHOWITZ: May the record reflect at the time the Baron's allegations were submitted in affidavit form, the defendant did not have any knowledge of Mr. Leuci's recantations of crime. What happened is that time and events overcame us and that is at the time the Baron's allegations were plainly the best evidence available to the defendant, that Leuci had committed more crimes that he admitted to. Subsequently to that they developed far better evidence, unimpeachable evidence by Mr. Leuci himself. Mr. Leuci continued to admit more crimes that he has denied to Federal officials to us and it is our expectation he will continue to admit even more crimes, but at the moment we have no reason to put on Mr. Lawrence to prove --

THE COURT: That is your tactical decision. It has legal consequences. You may make the choice. You are the attorney in charge of your case.

Proceed.

MR. DERSHOWITZ: We have no further questions of Mr. Sagor.

THE COURT: Anything?

MR. JAFFE: May I have just a moment, your Honor?

THE COURT: Yes.

CROSS EXAMINATION

BY MR. JAFFE:

Q Mr. Sagor, with regard to this tape that you have been questioned about -- with regard to the tape that Professor that just made reference to, would you tell the Court specifically when it was that you first heard about the existence of that tape? Was that in June of 1974?

A We have a letter from Mr. Rogers, Mr. Jaffe, in the correspondence file. I could read that. That letter had to do with one tape recording and after Mr. Rogers sent over other tape recordings and told us about it, I on my own, since we were going to turn over one tape recording, told Mr. Dershowitz or Mr. Oppenheimer or Miss Baker, one of the defense team, about the existence of the other tapes.

I think the first tape is June 18th. I could read the letter and tell you for certain. The record should reflect, if you asked me the question, that this is the first time to my knowledge anybody in the United States Attorney's office has known about a tape recording in Mr. Roger's office.

Q That was the next specific --

A That was in March.

Q That was the next specific question to you. Was that the first time, the letter from Mr. Rogers, that you or anyone in the United States Attorney's office to your knowledge first heard of the existence of this tape?

A It is the first time I heard of the existence of the tape. It is possible that in papers they gave me, they indicated that he had a tape, but I don't remember. I don't think so. It's the first time I knew about it, consciously, that there was a tape.

THE COURT: What's Mr. Roger's exact job?

THE WITNESS: He, your Honor, is the -- I don't know what his title is but he is elected by the five District Attorneys as the narcotics prosecutor --

THE COURT: He is the overall narcotics prosecutor for New York City?

THE WITNESS: That's right.

Q Directing your attention to the time -- until Mr. Glekel finds that letter --

A I think there are two letters, Mr. Jaffe. The first from Mr. Rogers is dated June 19, 1974. It is on carbon paper. I don't have the -- no, I have it. It is directed to Mr. Curran. It says:

"Due to the recent revelations in the newspapers concerning Detective Robert Leuci and Informant Richard Lawrence, a/k/a the Baron, I am forwarding to you a copy of a tape recording made of an interview between Mr. Lawrence and David Cunningham of my office. This interview took place on March 2#, 1973, during preparation of Mr. Lawrence's testimony on a separate and distinct matter. I am sure you are aware of these facts, but due to the recent revelations this interview may prove to be of some value to your office. I stand ready to supply you with additional information."

One tape recording was submitted pursuant to that and then there is another letter from Mr. Rogers dated, I think, the 27th of June.

Is it necessary to read that?

Q No.

Directing your attention to on or about April 8th or 9th --

A I may have misspoke about the June 27th letter. I think there is one but I am not sure.

Q Mr. Sagor, directing your attention to April 8th or 9th, that's the day you testified that you had a conversation with Detective Leuci concerning the Goe memo-

randum, is that correct?

A Yes.

Q Is it a fact, sir, that the reason that you were as upset as you were as has been described by both yourself and Detective Leuci concerning the Goe memorandum, is that you were aware, were you not, that Leuci had testified at the Rosner trial as to his criminal involvement. That's correct, is it not?

A Right.

Q You were aware, were you not, that had the Government, whatever agency of the Government made that Goe memorandum available to either you or Mr. Morvillo, you would have questioned Detective Leuci about that, would you not?

A Absolutely true.

Q And Mr. Leuci would have testified to that at trial, is that correct?

A That's correct.

Q So that the reason that you were in the state of mind as it was described before, was that you did not want to have any problem, even though it may be a de minimis problem, created by the fact that some way you had not received or for some reason you had not received the memorandum that you saw on that day, is that correct?

A Yes.

Q Mr. Sagor, did you ever wilfully suppress any evidence or fail to comply with any of the rules under Brady versus Maryland?

MR. DERSHOWITZ: Objection, your Honor.

THE COURT: Overruled.

A No.

MR. JAFFE: No further questions.

THE COURT: Anything further?

MR. DERSHOWITZ: We have no further questions.

THE COURT: You may step down.

(Witness excused.)

THE COURT: Call your next witness.

MR. DERSHOWITZ: We have one final witness, Mr. Backster.

May we approach the bench as that witness is being called?

THE COURT: Yes.

(At the side bar.)

MR. DERSHOWITZ: Your Honor, I think we can finish with this witness in about ten minutes and it's my strong hope subject, of course, to being at your Honor's disposal for any, I shudder to use the word, possible disciplinary suggestions --

THE COURT: I am going to give you every oppor-

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tunity to prove these statements that you made, Professor. I mean that. You will have as long as and as much as --

MR. DERSHOWITZ: That matter, as far as we are concerned is finished. We have done all we propose to do at this point other than the possible calling of Mr. Gordon, who we would like to --

THE COURT: I have set that down for a week from Monday.

MR. DERSHOWITZ: Can we, in this hearing today, and not resume on Friday, and pick it up a week from Monday if anything is necessary?

THE COURT: Do you contemplate any other witnesses as you stand here now?

MR. DERSHOWITZ: No.

THE COURT: Then you have nothing to bring you in on Friday.

MR. JAFFE: We do. The matter we have to complete is this. Your Honor has yet to rule on that last group of papers. We have this afternoon provided Mr. Dershowitz with the rest of the papers you ordered us to turn over. That is now complete. If Professor Dershowitz is going to rest his hearing and resume to hear only Mr. Gordon a week from Monday and he hears only Mr. Gordon, that's fine. But in the interim he indicated

he may want to recall certain other witnesses, including Detective Leuci upon his having read the papers.

MR. DERSHOWITZ: We have no current expectation of doing that.

MR. JAFFE: Let me just finish my statement, Professor.

If he reads all the papers and states to us that he has no intention of calling anybody else but Gordon, that's fine. We would like to have that whole matter of going through all the files and all the papers completed and have a statement in court on Friday that he is done except for Gordon because otherwise, a week from now we will have a reopening of the entire hearing.

THE COURT: He tells me that the last witness will take about ten minutes. I have this file on my desk. I am going to go through it between that time and 4.30. I will ask Professor Dershowitz to read all of this material over the weekend -- I mean tomorrow. And if he intends to call any further witnesses based on that, we will reconvene on Friday morning.

MR. DERSHOWITZ: Is it possible -- it would be a tremendous incon venience for me --

THE COURT: I am not particularly keen on coming in on this particular Friday, but I will do it if it is

necessary to complete this hearing.

MR. DERSHOWITZ: We can represent to the Court that we have no current intention of calling anybody --

THE COURT: I understand that and if that continues after you have read what's made available to you, then we will recess until a week from Monday. But if, after reading this material tomorrow, or today, or tonight, you feel that you want to go forward, then be here Friday morning with those people or call me at my home and let me know that I am to be in court on that day.

MR. DERSHOWITZ: What I would really like to request, if it's not too difficult, is that if that does happen and I don't expect it would happen, that we could do this all together on Monday. It is really an enormous inconvenience to me to have to come down on Friday for a half hour.

THE COURT: It is not pleasant for anybody.

MR. DERSHOWITZ: It is extremely difficult for me --

THE COURT: I do feel I have given you the fullest kind of opportunity to make a record here. Frankly, I expect to be criticized for it at the Court of Appeals, but I felt it would be terribly important you have every opportunity to put on the record everything that might

bear on this subject whether i agreed with it or not. I do want to wind this up.

MR. DERSHOWITZ: I think we can wind this up this afternoon. If I can explain off the record to your Honor --

THE COURT: I will hear you after the witness and after I have gone through that file and if you have urgent personal circumstances, I will consider them.

(In open court.)

THE COURT: Call the next witness, please.

- -

C L E V E B A C K S T E R , called as a witness by the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q Mr. Backster, are you a recognized expert in the use of the polygraph?

A I believe there are those who will say that, yes.

THE COURT: Where is your office?

THE WITNESS: In New York City, sir.

THE COURT: Where?

THE WITNESS: 165 West 46th Street.

MR. DERSHOWITZ: Will the Government consent to admitting the statements relating to Mr. Backster's background without having to go through his long list of --

THE COURT: When I was in practice, I once brought a client of mine up to Mr. Backster's office for examination and after which I decided he would not be permitted to take the stand. So I will accept Mr. Backster.

Q Can you tell us whether on June 26, 1974, you examined the polygraph charts of Richard Baron Lawrence made on January 17, 1973, by Harry T. Mahoney?

A Yes, that's correct.

Q Did you form a conclusion on the basis of examining those charts?

A I formed -- well, actually I might explain we have three determinations that can be made from polygraph charts. Either in our opinion the man is being deceptive, truthful or in our opinion the charts are inconclusive and my result was, as far as my review of the charts were concerned, I felt the charts were totally inconclusive.

Q Can you tell me how many indicators there existed on the Baron's graphs?

A There were three indices that were recorded, namely, the breathing, galvanic skin results which were not functioning, and the cardio or blood pressure, heart phenomena. There were two tracings representing the breathing phenomena. In other words, there was a chest tracing and a stomach tracing and these tend to be very similar, but one can account as a sort of a confirmation on the other on the same index.

Q Would you say generally how many independent indicia were used?

A The standard three.

Q Were all three working?

A No, the galvanic skin response index was extremely sluggish to the point of being non-productive.

Q You looked at control question No. 6, did you not?

A Well, maybe you should read that question for me.

Q "Have you ever lied to the BNDD?"

A This was a question, in fact -- in the way of background, I might state as far as modern polygraph procedure is concerned, not only need there be a lack of reaction to relevant questions but a presence of reaction on the control question.

On this set of questions I had difficulty in trying to determine what the control questions would be, and the No. 6 question that you mentioned:

"Have you ever lied to the Bureau of Narcotics & Drug Division" I would not be able to decide whether that was a control or relevant question. If it were a relevant question, it was a very poorly formulated question, being ambiguous, so I think this would not really classify in either of those two classifications.

Q Do you think an expert could make a positive, firm conclusion that the Baron was lying on the basis of the charts and the questions that you have examine?

A Would you repeat that again, now?

An expert?

Q Could an expert --

THE COURT: Will you read the question.

(Question read.)

A If I understand your question, you are asking me if two experts could disagree.

Q I am asking you could any expert reasonably conclude on the basis of these charts positively that the Baron was lying?

A I would state not, in my opinion.

MR. DERSHOWITZ: No further questions, your Honor.

CROSS EXAMINATION

BY MR. SAGOR:

Q When the question was asked of you positively, and if I ask you the question differently, would your answer be different?

A If you'll try the question, I will give you an answer.

Q First let me understand something.

The control question was:

"Have you ever lied to the Bureau of Narcotics & Dangerous Drugs", is that correct?

A I was raising the question as to whether this would qualify as a control question because it overlaps the very area of the purpose of the test. This should not be done.

Q Let me understand something. Were you informed there is evidence in this case that the Baron was an informant for the Bureau of Narcotics & Dangerous Drugs for a period of time?

A Yes, I understand that.

Q And that time period in which he was an informant for the Bureau of Narcotics & Dangerous Drugs, he carried out the functions of an informant.

A Yes.

Q And you are familiar with what an informant does?

A At times I feel I am.

Q As a matter of fact, informants are perhaps people who come to you to take up polygraph tests; is that correct?

A Usually the informants are brought to us. I believe we're talking about the same thing.

Q Did you understand that the control question in this case was that Question 6 was a control question? In other words, that the Baron had been interviewed in a pre-interview and said yes indeed, on occasions -- having

nothing to do with the allegations against Leuci -- that on occasions he had lied to the Bureau of Narcotics & Dangerous Drugs?

Did you understand that to be the control question?

A I found it very difficult to entertain the idea that was a control question. It wasn't my understanding from anything I saw from the record that would pinpoint this as a control question.

Q You really don't know, is it fair to say, whether it was a control question or not?

A I didn't know one way or another. It was in doubt.

Q Supposing for the moment, can you assume with me that could be a control question.

MR. DERSHOWITZ: I object on the ground it is hypothetical.

MR. SAGOR: We don't have Mr. Mahoney. It's based on the charts here and I can only go on the basis of supposition.

THE COURT: He can ask him that question.

MR. SAGOR: Yes.

THE COURT: I'm glad you agree with me, Mr. Sagor.

MR. SAGOR: I'm sorry, I thought you were Mr.

Jaffe.

THE COURT: No.

Q Is it possible in the pre-interview period before the machine was turned on, the Baron would under normal procedures be interviewed by the polygraph operator?

A Yes, that's correct.

Q He might be asked questions about his past having nothing to do with the subject of the polygraph examination?

A General background questions, yes.

Q Would you agree one question would be asked, during the years you were informing for the Bureau of Narcotics & Dangerous Drugs have you ever lied to the Bureau of Narcotics & Dangerous Drugs? Would that be a reasonable control question to ask?

A In my opinion, if I were constructing the question, I would not choose that but I believe some polygraph examiners would feel this to be a reasonable question.

Q Would it be fair to say if that question were put, and Lawrence said yes, I did lie on that occasion for this or that reason, I did lie, that could be used as a control question thereafter, is that correct?

A If he admits that he did lie, he would have wrecked the question for a control question. He would

have to be denying he lied in order for it to be a control question.

Q Could that be a control question then?

A If he denied he had lied?

Q That's right.

A By my standards it would be considered a poor one, but I think it could be used as a control question.

Q Let's assume for the moment if you would, that was in fact, although not a question used by the polygraph operator, and we have to assume for the moment that was a control question.

A Yes.

Q Did you make any effort or did you have the opportunity to speak to Mr. Mahoney to discuss with him what procedures he used in the pre-interview, pre-machine period?

A No, I did not.

Q Would it have been helpful to know indeed what truly were the control questions?

A Ordinarily I would say this would be quite correct. In this particular case, there was no question on that test by the most liberal interpreting of that, which I saw on the chart that produced reaction, so it became very academic whether it was control or not control. If the question were poorly formulated, it wasn't function-

ing. When I looked at that particular question on the tracings, I did not see a distinct presence or reaction.

Q That is your opinion?

A Yes.

Q Isn't it fair to say another polygraph operator who knew what the control questions were and we're not certain that we know what Mr. Mahoney's control questions were --

A Yes, that's fair.

Q It may be Question No. 7 was considered a control question or Question 3 or any number of possibilities?

A This is true.

Q You cannot tell from this chart. You are not saying there are no control questions from the chart, you can't controvert there were in fact control questions used, is that right?

A May I explain that?

Q I am going to have to leave that up to the defense. I'm not trying to trick you, but try to answer my question.

A I believe your question was --

Q Can you deny that there were control questions from your examination of those charts?

A I can neither deny nor confirm the control ques-

tions.

Q Is it fair to say that an operator who conducted an interview using those charts and knowing what his control questions were may well have concluded conclusionary determinations from the lie detector test?

A In my opinion, irregardless of the preliminary interview, the charts would have to have produced a presence of reaction either on relevant questions or on control questions. One or the other, not both, or not lack of both.

Q Are you saying that there are no stress indications on that chart?

A I didn't say that. There are no deception indications on the chart nor are there truth indications on the chart.

Q Isn't it fair to say there are stress indications on the chart?

A Stress does not automatically become deception unless accompanied by reaction on the opposite kind of question that would be located not further than one or two questions from the question considered.

Q Isn't it fair to say there are stress indications accompanying some deception indications on the chart, although they are not as conclusive as you would like to

see them to be so you could make a determination that he had been deceptive?

A In the first place, I feel that even the presence of stress-- I would have to look at the charts again and you would have to point to the area concerned -- but as I looked at those charts on the occasion of my review, I did not see presence of stress, let alone deception on the charts.

MR. SAGOR: May this be marked the next exhibit, your Honor.

(Government's Exhibit 15 was marked for identification.)

MR. DERSHOWITZ: May I see that?

MR. SAGOR: No, not yet.

Q I show you Government's Exhibit 15 for identification.

Will you study that, please?

A What chart did you have in mind?

Q Chart 1, under the heading of Government 15.

MR. DERSHOWITZ: May I ask whether those are the original of the charts?

THE COURT: What are they?

MR. SAGOR: Different examinations of the Baron. I would like to know what his charts looked like. Maybe

this will aid Mr. Mahoney -- I'm sorry, Mr. Backster in the issues.

MR. DERSHOWITZ: Those are not originals of the charts.

MR. SAGOR: This is where he flunked a lie detector examination.

MR. DERSHOWITZ: May we have the date?

MR. SAGOR: August 25th, 1971:

"Richard Lawrence voluntarily came to the polygraph suite accompanied by his attorney for a polygraph examination. The facts concerning this case were provided to polygraph questioners by Lieutenant Robert Carr of the Intelligence Division, New York City Police Department and Bronx County Chief Assistant Seymour Rodkin. Mr. Katz, counsel for Mr. Lawrence and Lieutenant Carr were present in the polygraph suite during the polygraph examination of Mr. Lawrence."

THE COURT: That's enough.

Q Mr. Baxter, can you compare Government's Exhibit 15 for identification with Defense Exhibit F, I believe, in evidence?

MR. DERSHOWITZ: Objection, your Honor. I don't see the relevance of a chart taken under wholly

different circumstances.

THE COURT: I don't either. Sustained.

MR. SAGOR: I am waiting for the expert to see, your Honor.

THE COURT: What is it you would like him to tell you?

MR. SAGOR: He might well conclude from that chart that something cannot be determined from the chart.

MR. DERSHOWITZ: Your Honor, this is a fishing expedition.

THE COURT: What does that have to do with --

MR. SAGOR: That an expert can look at someone else's chart, and reach a conclusion --

THE COURT: Are you questioning his ability to read charts?

MR. SAGOR: No, your Honor.

Q Mr. Baxter, in your opinion is it proper procedure for an expert to reach the best conclusion based upon someone else's examination without calling him and knowing what the procedures were used? Is that the best procedure? Yes or no.

A Is that the best procedure?

Q Yes.

A It's not the best procedure.

THE COURT: One or two questions.

You said in the very first part of your testimony that these particular charts were inconclusive, is that correct?

THE WITNESS: Yes, that's right.

THE COURT: And that based on the charts alone you could not express any opinion as to in effect whether or not this person was lying in response to certain of the questions; is that right?

THE WITNESS: Yes, sir.

THE COURT: Based upon your experience, is it your opinion that a qualified polygraph person with those charts, using those charts, but having participated in the examination and having observed the individual examined during the examination, could such a person form an opinion as to whether or not the subject was lying in answer to certain questions?

THE WITNESS: You mean, sir, in addition to the data, the exhibit on the charts?

THE COURT: I am talking about your conducting an examination. First of all you sit with the man, talk to him before you actually write your questions out on a piece of paper, right?

THE WITNESS: That's correct, sir.

THE COURT: And you converse with him about various and sundry things and you get the questions all checked and you hook him up to the machine, is that right?

THE WITNESS: Yes.

THE COURT: And you ask the questions and the needles are going up and down and that's the way it's done, isn't it?

THE WITNESS: Yes, sir.

THE COURT: I am asking, even though the chart itself may not be particularly conclusive, would the over conduct of the examination -- do you understand --

THE WITNESS: Yes.

THE COURT: Would the overall conduct of the examination, together with the chart permit you to come to a conclusion that certain questions were answered faulty even though the chart itself in inconclusive? Is that clear?

THE WITNESS: Yes, sir, your question is clear.

My answer to that would be, and perhaps I'm more strict than someone in the field, but the chart must show truth of deception.

In other words, if there is a behavior tally list or body language observed or a person's reaction to the certain circumstances that is in any way reinforcing

his decision from the occasion of his looking at the chart, we feel should not replace the use of the charts to arrive a determination.

So, in fact, in even teaching our school, we have second-week students there that are reading charts alone without knowing anything, without knowing the questions concerned except they are relevant questions or control questions so the charts should stand on their own merit.

Q Mr. Baxter, keeping in mind Judge Bauman's question, you say you were stricter, perhaps, than some people in the field. Remembering all of Judge Bauman's questions, could some people conclude, with these charts, that the man was being deceptive?

A This obviously is a possibility, but they would be using something to reinforce the interpreting of the charts.

MR. SAGOR: No further questions.

THE COURT: Anything else?

REDIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q Would you generally describe charts as, in general, flat charts?

A Yes, sir, they are very flat charts. They didn't adhere to that which we call a necessity or rule where a person must show capability of reaction along with lack of reaction to either the control or relevant questions and also, the type of case tends to be a less reliable kind of case for polygraph. It's a confirmatory kind of case, and these are not as reliable as having a suspect on hand, asking direct "did you yourself" questions.

MR. DERSHOWITZ: No further questions.

THE COURT: Are there any other witnesses?

MR. DERSHOWITZ: We have no other witnesses.

The government would like -- I'm sorry -- the defense would like to move the admission or ask the court to take judicial notice of portions of a transcript in the case involving the defendant James Junko, wherein Detective Leuci testified extensively as to the credibility of Richard Lawrence.

MR. SAGOR: Objection, your Honor. The professor does not understand the rules of evidence. When Detective Leuci was on the stand, if he wanted to examine

him about any opinion he had about the Baron he could have.

THE COURT: He did ask some questions.

MR. SAGOR: Yes. He said he was a pimp --

THE COURT: Sustained.

MR. DERSHOWITZ: We are not seeking to admit this as to its truth but the statements were made in a court of record on a particular day and the rules of evidence are clear the court should take judicial notice --

THE COURT: I think Leuci said on the witness stand there were circumstances in which he found the so-called Baron a reliable informant.

MR. DERSHOWITZ: We would like to have this admitted into evidence, with that limited person, as simply one incident of this kind of testimony.

THE COURT: I don't think it is necessary.

MR. SAGOR: Does the defendant rest, your Honor?

MR. DERSHOWITZ: We would also like to move, as we stated before, by stipulation for the admission of these affidavits of witnesses --

MR. SAGOR: I object, your Honor. He said before he was going to call the witnesses, decided not to use that procedure.

MR. DERSHOWITZ: I had understood in chambers if we --

THE COURT: You did say, Professor, you were going to call the witnesses.

MR. DERSHOWITZ: My recollection is --

THE COURT: Mr. Brackster has finished. Why do we need his affidavit?

MR. DERSHOWITZ: First of all, the portions of affidavits dealing with the expertise --

THE COURT: That is received.

MR. DERSHOWITZ: And second of all, Mr. Sagor and Mr. Jffe represented if he could have an opportunity to interview Mr. True, to issue other affidavits --

THE COURT: I will received the affidavits of Backster and Kaufman in so far as this relates to the qualifications of these people. They have testified, and the rest of it is unnecessary.

MR. DERSHOWITZ: Subject to the reservation made on the record the defendant has no further witnesses and rests.

MR. JAFFE: One further record. Mr. Dershowitz asked Mr. Taylor to try to talk to somebody and find out what the name was in the file. There was an allusion made that the person in Taylor's file should

reflect around Leuci's house was Pizaro, who was a partner with Vinnie Papa. Contrary to that, Mr. Taylor has consulted with people and in a posttrial allegation there was an allegation that a man named Ratolo was in front of or surrounding the premises of Leuci's house. There was no substantiation to any allegation that Leuci had any involvement whatsoever with this man in any type of narcotics transactions. In fact, the man is Leuci's cousin.

THE COURT: Does the government intend to call witnesses at this point.

MR. SAGOR: No, your Honor.

THE COURT: We will recess the hearings then and a week from Monday we will hear Mr. Gordon and any other witnesses pertaining only to matters which Professor Dershowitz may have learned about from the papers which I have been making available to him.

That leaves this exhibit here and I am going to go through that in your presence. Indeed, I will do it out here but not sitting on the bench.

Court is in recess for the afternoon. There is no air conditioning in the robing room and we will all be more confortable.

MR. SAGOR: Mr. Jaffe may have been premature,

but the government asks the affidavit of Richard Lawrence be stricken and the affidavit of Miss Baker which alleges to the full truthfulness of the affidavit be stricken and the affidavit of Mr. McNally and the truthfulness of the allegation of the Baron be stricken as well as the statements in Mr. Dershowitz' brief that he intends to call Mr. Baron to substantiate the allegation.

THE COURT: Denied.

Now we will have a conference of counsel. Defendant may be present. I am merely moving location. The public is excluded.

(Defendant's Exhibit E was received in evidence.)

(The public was excluded from the courtroom; the court, counsel and defendant present.)

MR. JAFFE: Do your files reflect you have two separate sets --

THE COURT: I have something called allegations corruptions and IDCSF 36. Is that what you are talking about?

MR. SAGOR: These all should be in Court Exhibit 4, your Honor.

MR. JAFFE: There was also, I believe, your Honor, another court exhibit --

THE COURT: I am unaware of it. I told you that this morning. This is all that I have.

MR. SAGOR: There is another folder marked 3. I am going to return all this to you in a while anyhow.

MR. JAFFE: Your Honor, we have the original transcript of the hearing, the pretrial allegations, Court Exhibit 3.

THE COURT: I don't see them, but I will look again in my chambers.

MR. SAGOR: We have one duplicate original, your Honor.

THE COURT: I am going to return these documents after I read them, if I feel it is not necessary to make them available now.

MR. SAGOR: What you have in your hand is part of that folder, your Honor.

MR. DERSHOWITZ: Your Honor, Mr. Jaffe said he would prefer not to show the memorandum to Mr. Rosner. I told him I would be happy to comply with that, but I think I'm under an obligation to turn it over to my client if he asks me for it, unless I am under court order not to do so. And I certainly don't ask for such court order but I have to represent to the

court unless there is a court order if my client asks me for it -- I have no knowledge whether he will or not -- I can't, on the basis of Mr. Jaffe's suggestion, refuse to turn it over.

THE COURT: Why should his client not be permitted to see it in redacted form?

MR. JAFFE: Because some of the forms in redacted form, as Mr. Rosner is familiar with certain people, certain courts and people, the character involved --

THE COURT: I will order you further to redact it to eliminate such instances as you are now referring to and within the next week send a copy to Professor Dershowitz of the further redacted form. In the interim he will not show it.

MR. JAFFE: Is there any reason that that would interfere with the preparation of your defense?

MR. DERSHOWITZ: I don't think so but I would prefer to reserve judgment on it.

THE COURT: Court Exhibit 4 presents nothing that I am inclined to turn over to Mr. Rosner's counsel. again, it is absolutely unsubstantiated rumor. I would say the overwhelming number of situations it refers to are already turned over. In any event, it is merely unsubstantiated allegations, and even though the subject of

examination.

MR. DERSHOWITZ: I take it, your Honor, they will be retained by the government, these files.

THE COURT: Yes, indeed. Is this the Taylor memorandum now?

MR. JAFFE: Yes, sir. All of those, Judge, just as an aside, are what was outlined in the third section of Court Exhibit 1B so they ought to seem familiar to you as you go through them.

MR. DERSHOWITZ: Your Honor, we would accept the government's representation on that.

MR. JAFFE: No, let the court make its own representation.

THE COURT: That's perfectly fine for you to say but I'm the fellow who has to read through what seems to me 50 pages of Xerox material, in more or less readable form. Do I understand you just to have said that the information contained in Exhibit No. 3, I have basically turned over in terms of the material that I have authorized to be delivered to Professor Dershowitz.

MR. JAFFE: What did you have done, your Honor, is portions of it you have ordered turned over and portions you have ordered not to be turned over because it is repetitive.

THE COURT: Having that in mind I'll be happy to go through this if you want but I understood you to say if you basically have the information and if it came from here in the first place there really isn't much point in my going through it.

MR. DERSHOWITZ: If the government is representing that file contains only material which has been either turned over to us or your Honor has read and decided not to tunr over to us I see no reason for asking your Honor to go through this material again.

THE COURT: I think what he better say is it isn't material I have already read but material a summary of what I have already read in that very long document that I have completed examining this morning, Professor.

MR. JAFFE: You have read the material actually twice, your Honor. Most of the material in this exhibit is the allegations that you read the summaries of back at the time of the Rosner trial. This is a repeat of those allegations with some backup information. It's the backup paper to those allegations. These papers --

THE COURT: I remember reading that file clearly. Those are the ones I declined to turn over at that time.

MR. JAFFE: That's correct, your Honor. These papers contain the allegations that were contained in the summary of allegations, and for the most part some have additional information in it, but in substance it is the same allegation of the same crimes, and those allegations were briefly otulined with the papers we have turned over to defense counsel,and the information in this Court Exhibit 3 is either repetitive or the same allegations as in the police files, which have all been -- the substance of them, debriefing as to them have been turned over.

THE COURT: Do you want me to go through this? Mr. Dershowitz has the key to this. I will be happy to do it.

MR. DERSHOWITZ: Mr. Jaffe says -- these are not allegations you have read in the last year and a half, two years.

THE COURT: I have read a summary in -- what was the exhibit number?

MR. JAFFE: Court's Exhibit 1 and 1B, your Honor.

THE COURT: He tells me these things are summarized in 1B.

MR. JAFFE: Yes, your Honor, and it was

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turned over to Mr. Dershowitz in Exhibit 8 for identification, which he has a copy of.

MR. DERSHOWITZ: This morning?

MR. JAFFE: This morning.

MR. DERSHOWITZ: I haven't seen that. Let me tell you what I am interested in. If any of these files contain allegations which have proved to be true which ultimately turned out to be true, that Leuci admitted to, I think we might have an interesting argument to make to the Court of Appeals. If you can represent this doesn't include those I am very happy not to ask the judge to look through it.

THE COURT: The first one of these relates to Richard Cardi. It seems to me we have been through this ad nauseam.

MR. JAFFE: Just for the record, I misspoke before. The massive document was Exhibit 1, and then it was retyped as Court Exhibit 1B. Now, Mr. Dershowitz was given a redacted copy of that.

THE COURT: There is nothing in Court's Exhibit 3 that I feel requires it to be turned over for reasons previously announced.

I shall see you -- when? -- a week from Monday.

MR. JAFFE: We want one thing to be clear, Judge, and that is we don't want a week from Monday to open up an entirely new hearing based on what witnesses we have --

THE COURT: No, listen. I have told Professor Dershowitz,and he understands it very well, that I regard this charge he made very seriously and if it is unsubstantiated I shall consider what I feel required to do about it. I am going to give him a chance to prove that charge. Have that clear in your mind.

We are talking about the charge that he made that the United States Attorney deliberately suppressed evidence in the Supreme Court of the United States. That's the charge. I don't think lawyers out to say that kind of thing if it isn't true.

MR. JAFFE: With regard, for example, to Detective Leuci, his being recalled --

THE COURT: I can't imagine what he would know about that.

MR. SAGOR: No, your Honor, based on the papers turned over to Mr. Dershowitz, we don't want to have --

THE COURT: I will rule on that on Monday, if it should become necessary. He is going to have a chance to read this material which has sort of trickled through to him and make up his mind about whether he wants to call anybody back to interrogate him about these particular things and if he does he will have the opportunity to do so.

MR. DERSHOWITZ: Thank you, your Honor. Have a good weekend.

(Adjourned to Monday, July 15, 1974.)

WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
Edward M. Shaw	452			
William J. Wolf, Jr.	476			
Victor Kaufman	490	497	513	
Ralph True	519	527	550	560
			560	
Thomas P. Taylor	562	580	584	
Elliot G. Sagor	589	670		
Cleve Backster	679	692	705	

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6		472
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11	481	
12	505	

Defendant		
C		476
D		477
E		496
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UNITED STATES OF AMERICA

v. 72 Cr. 782

EDMUND A. ROSNER

July 15, 1974
10:00 a.m.

(In the robing room.)

MR. DERSHOWITZ: In light of what occurred at the end of last week's proceedings and your Honor's suggestion of the possibility of a disciplinary action against me in the event I was not able to prove my charge of deliberate withholding of information by the Government, I felt it necessary to call, to ask for this chamber's proceeding, and to introduce Monroe H. Freedman of the Hofstra Law School whom I had asked to act as my attorney in this matter in the event this were to come, the disciplinary proceedings, and I would like to move his admission pro hac after a brief statement about his background.

THE COURT: I don't think it is necessary. It is a pleasure to admit him.

MR. FREEDMAN: Thank you.

MR. DERSHOWITZ: It's appropriate to note that Mr. Freedman is a former member of the Board of Governors of the D.C. Bar Association, and former chairman of the

Federal Bar Association's Committee on Disciplinary Standards and Procedures, and has written numerous articles including a column in the New York Law Journal, and is in the process of writing a book now on legal ethics under the sponsorship of the Ford Foundation, and perhaps Mr. Freedman may want to make a brief comment that was before the Court last week.

THE COURT: I am not altogether sure this ought to take place in court. I said what I said in open court and I am not sure any proceedings with respect to this shouldn't take place in open court.

But I think if it's not too much of an inconvenience for you, I would like to -- I understand that there are to be two witnesses this morning, or so my law clerk tells me, saying he wants to have Mr. Gordan called and Mr. Leuci.

I gather one of you told that to one of my law clerks; is that correct?

MR. DERSHOWITZ: Yes.

THE COURT: Why don't we dispose of that first, and then we can deal with this?

MR. DERSHOWITZ: Certainly.

THE COURT: All right, we will do that.

(Recess.)

(In open court.)

THE COURT: Professor Dershowitz, I think the ball is with you.

MR. DERSHOWITZ: We'd like to recall Detective Robert Leuci.

MR. SAGOR: We have Mr. Gordan in the courtroom We are prepared to have Mr. Gordan and Mr. Leuci. We have Mr. Gordan here and we are ready to go with Mr. Gordan.

J O H N D. G O R D A N, III, called as a witness by the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q Good morning, Mr. Gordan.

A Good morning.

Q Mr. Gordan, can you tell us what your position is with the United States Government at the present time?

A I am an Assistant United States Attorney in the office of Paul J. Curran, United States Attorney for this District.

Q Do you have any special function that you perform in that office?

A I am the Chief Appellate Attorney.

Q And in that connection are you the person who

has frequent contact with the office of the United STates Solicitor General?

A That is correct.

Q Can you tell us when you first had contact with the United States Solicitor General's office in the case of Edmund Rosner vs. the United States?

A Not specifically. I don't recall whether I had any contact with the Solicitor General in connection with the initial certiorari petition and his response. The first contact that I remember with the Solicitor General's office in connection with the Rosner matter was on April the 30th, 1974.

Q And on April 30, 1974, could you describe to us the conversation you had -- I take it it was a conversation on the telephone -- with a member of the Solicitor General's staff?

A Yes. As best I can remember it, I called Mr. Andrew L. Frey, who is a Deputy Solicitor General, and he was, as I understand it, in charge of handling criminal matters for the Solicitor General's office. I called him in connection with the Rosner case, and advised him that we had information that Robert Leuci had lied when he had testified at the trial of Mr. Rosner when he claimed that he had committed no crimes other than the crimes which he

admitted to on the witness stand, that this was a subject of an on-going investigation, that we had not been aware of these crimes that he had falsely denied having committed at the time he made the false denial, that an on-going investigation was taking place, that there was, as I remember it -- I think I said there was a new trial motion pending at which all this would come out on the hearing, and that we didn't think there was anything the Solicitor General had to do, but we wanted him to know about it since the ball was in his court.

Obviously, this is an abbreviated version of the conversation.

Q Did you tell Mr. Frey that up to that point you had not notified Mr. Rosner's attorneys about these charges?

A I don't recall the matter being discussed specifically.

Q When did you first learn that Mr. Leuci had made certain statements admitting crimes in addition to those he had --

A Professor, I hadn't finished the conversation.

Q I'm sorry. Go ahead.

A No, it was just a very little more.

Mr. Frey said, as I remember, that he didn't

think there was anything to do, either, but that he would talk to the Solicitor General and get back to me if there was any problem.

Q I take it you were aware that ultimately a decision was made that there was something to do?

A Oh, yes. I had, I believe, two other conversations with Mr. Frey on April the 30th besides the one I just related.

THE COURT: Tell us what they were.

THE WITNESS: Well, I believe -- I don't have a specific recollection of this, but I believe what happened next is that late in the afternoon on that day, April the 30th, Mr. Frey called me back and told me he had talked to the Solicitor -- I believe that's what he said -- and that they thought they might well have to advise the Court that Leuci had testified falsely at the Rosner trial and what was our position on this; and I went and spoke with the United States Attorney and asked him what our position was on that, and subsequently advised Mr. Frey that we wished that they would not tell the Supreme Court about this, because we had an on-going investigation, revealing the fact that Leuci had lied had lied, it would jeopardize the on-going investigation --

Q This was on April 3 --

MR. SAGOR: Let him finish, your Honor. Excuse me.

THE COURT: Let him finish.

A It was on April 30, late in the afternoon, after six o'clock, there was a new trial motion pending at which we would redevelop the kinds of things that Leuci had done and we wished they would not do anything about it.

As I recall Mr. Frey said at the end ofthe conversation, "Well, we will see," and that took care of my conversations with Mr.Frey for that day.

I had another conversation with him the following day.

THE COURT: Tell me about that -

MR. DERSHOWITZ: One question your Honor.

THE COURT: Yes.

Q On April 30, 1974, were you aware that Maurice Nadjari, the special prosecutor for the State of New York was contemplating bringing a lawsuit within the next couple of days seeking the disclosure and access to Robert Leuci?

A Absolutely not.

THE COURT: Tell us about the conversation after that, that would be May 1.

THE WITNESS: That is my recollection. The

next day around two o'clock in the afternoon or slightly before that I was in Mr. Curran's office and I saw there an order to show cause, I believe issued out of the State Supreme Court by Mr. Justice Murtagh, with an affidavit by, I think, a man named Phillips, setting forht the fact that Leuci had made admissions to them that he had lied in the Rosner case, and he was a criminal of some kind.

I have forgotten exactly what it said. In any event, I spoke with Mr. Curran and went back and called Mr. Frey that same day, as I remember it, and said, "You need not be concerned any longer as to whether you will jeopardize an ongoing investigation in view of the fact that the false testimony by Leuci is now a matter of public record.

Q When did you first learn of statements made by Mr. Leuci?

A Truthfully, Professsor, I don't know when I learned.

Q Would it refresh your recollection to know that the U. S.Attorney's office first learned about them approximately the 18th of April?

Was it shortly thereafter, was it close to the 30th of April?

A No. The way I got into all of this was that, as I remember it now, obviously this is some time ago, I

was called in to Mr. Curran and he and I had a brief conversation at which he said or asked me what the legal effect would be of false testimony by a Government witness on collateral matters in a criminal trial, and I told him that -- I asked him whether we were aware of the falsity of the testimony at the trial and he said no, certainly not.

This was in the nature of a hypothetical question.

I said I didn't think it would have any legal significance if it was on a purely collateral matter, and at that point I think he advised me that there was a problem with Mr. Leuci. I think he said that Mr. Giuliani or Mr. Jaffe or one of those people had been talking to Mr. Leuci, that Mr. Leuci had not admitted any further crimes, but I think had said something like, "I don't know whether to get a lawyer or come over and tell you guys everything," and the substance of Mr. Curran's view was that Leuci was a very bad actor and probably had committed a great many crimes which he had denied on the stand, and that it was a question of time about finding out what those crimes were.

That is how I first found out bout the possibility.

Subsequently, tho I don't remember it specific-

ally, I was told in dribs and drabs as Leuci began to admit to things what it was that he was admitting to.

Q So it is your testimony that the first knowledge you received about the possibility that Leuci perjured himself occurred before Leuci made specific statements admitting his crimes to the U. S.Attorney's office on April 19 or 18?

MR. GLEKEL: Objection. There is no testimony by the witness that he knows when Leuci first made admissions of additional crimes.

THE COURT: I don't think that was implicit in the question. Read it to me.

(Question read.)

THE COURT: There are twoo many suppositions in that question. Rephrase it, please.

Q Have you then testified that at the time you first learned from Mr. Curran about the problem with Leuci Mr. Curran told you that Leuci had not yet specifically admitted any crimes?

A I think that's right. I am not positive, but the impression I had at the time was that it was impending, that it was contemplated that we were going to find out one way or the other that he committed other crimes and that we had not yet found it out but fully expected to.

Q It is your testimony that at the time you first learned about it Mr. Curran told you that Leuci had not yet firmly and unequivocally admitted to committing various crimes?

A It is possible he had admitted to something. The impression was that he had certainly not admitted to anything like what I understand he ended up admitting.

THE COURT: Tell us what your best recollection is, please.

THE WITNESS: My best recollection is that he had not admitted specifically to any crimes but he had -- I am sorry, he had asked -- now I remember, he had asked a hypothetical question. I don't remember what the question was, but he had asked as I remember what if such and such and such, what would be the effect, and the such and such was crimes by Mr. Leuci. That I think I do remember. He had not admitted it, but he had asked a hypothetical question --

MR. DERSHOWITZ: Maywe have a representation from Mr. Jaffe as to what date this hypothetical question was asked and how much before April 19?

MR. JAFFE: I don't know the answer, your Honor.

THE COURT: Proceed.

Q As I understand your testimony of about two or three minutes ago, it was your legal advice to Mr. Curran that the critical manner in terms of effect on new trial motion, the critical matter was whether the Government was aware pretrial of Leuci's admitted crimes?

MR. GLEKEL: Objection. I don't recall the witness testifying to that.

THE COURT: Neither do I.

MR. DERSHOWITZ: I do.

THE COURT: Sustained.

Q Did you ask Mr. Curran whether the Government was aware of Leuci's crimes at the time of the trial?

MR. GLEKEL: Objection, your Honor. I don't see why the witness's discussion with other members of the U. S. Attorney's office are relevant. It seems the only relevant issue is what was done, what was told the Solicitor General.

THE COURT: No. I don't think so at all. There are different standards as to a new trial motion as you know as to whether it was deliberately withheld or it was inadvertently withheld. I think his question bears directly on at least one of the aspects I am here to decide.

Proceed. Overruled.

(Question read.)

A I think the framework of the conversation was more in the natur e of whether we were aware that Leuci had lied at the time that he did lie and the answer was no. I don't remember specifically, but I have that impression.

Q Did you tell Mr. Curran at that time in substance that that was important, whether or not the Government knew that Leuci had lied pretrial?

A In substance it seemed to me that that was determinative of the question and that is what I told Mr. Curran.

I may say, Professor, that the question as I told you was initially put to me hypothetically and then I was advised exactly what the context of the thing was.

Q At the time you were asked the hypothetical question it was your best legal advice that the Government's knowledge was a critical determining factor as to whether a new trial might be granted?

A It was a critical factor.

Q Did you have any written communication with Mr. Frey in the course of these proceedings?

A Yes. I think I sent him two or three cover letters sending down papers. At some point after the knowledge of Leuci's false testimony became public Mr. Frey asked for copies of various papers that had been filed

in the District Court here. I think your new trial motion No. 3 and possibly the first new trial motion -- I don't specifically recall -- in any event I did send him down various things and wrote him letters about it.

MR. DERSHOWITZ: Excuse me, your Honor. May I have a minute?

THE COURT: Yes.

(Pause.)

Q In preparing for your testimony today did you refresh your recollection by looking at any of those letters of correspondence to Mr. Frey?

A No, sir.

Q Do you have any of those letters or correspondence with you today?

A No. But I should have them down in my office if you require them. I should. I am not positive I do, but I ought to know where they are.

Q We would like to have them produced for our inspection if they don't violate any rules of confidentiality.

THE COURT: You can do that while Mr. Leuci is on the stand.

Q You described several conversations with Mr. Frey. Did you have any other conversations with Mr. Frey in the succeeding days?

A Oh, yes. I had a number of conversations with Mr. Frey.

Q Could you describe each one of them?

MR. GLEKEL: Objection. I assume the question is restricted to conversations relative to the Rosner case.

MR. DERSHOWITZ: Yes.

THE COURT: Yes.

A I don't think I can describe all of them. I can describe a few that I recall.

My recollection of the next conversation -- but it is very likely not the next, but it is the next one I remember -- occurred in connection with the -- there was some hearing in the removed matter brought by the Special State Prosecutor Mr. Nadjari at which you appeared and made a statement in connection with the Rosner case and my recollection of the next conversation I had with Mr. Frey or the next conversation I recall with Mr. Frey, I should say, had to do with the statement that I was advised that you had made at whatever this hearing was, and as I remember it what I was told you had said was that the Solicitor General would undoubtedly question error in the Rosner case because of a case called Mesaroch, and that furthermore it appeared that the Solicitor General had filed papers with the Supreme Court which had misled the Court.

I think there was a suggestion that they had deliberately misled the Court. That I am not clear on and I called Mr. Frey and advised him of that and his reaction as far as questioning error was concerned was, "Well, we will see about that."

As I recall he was somewhat annoyed at the suggestion that the Solicitor General had been deliberately misleading the Supreme Court. I don't remember when this was, but I assume it was the same day -- I think it was the same day when these statements were made.

Q Were you in court when I made the statement?

A No, sir.

Q Who told you I had said that the Solicitor General said --

MR. GLEKEL: Objection.

THE COURT: Sustained.

Q Had you been told by a Government attorney that I had stated in open court that the Government had deliberatel misled the Supreme Court?

MR. GLEKEL: Objection.

THE COURT: Sustained.

Q We are talking now about a conversation between you and Mr. Frey in the first week of May. I take it the hearing on the Nadjari matter was approximately May 3 or

4 and that is when I got up and made the statement.

Can you indicate what your next communication with the Solicitor General was?

A As I remember it, he called me at some point, Mr. Frey called me and said that the Mesaroch case was rather peculiar. I had never heard of the case when I communicated your message to Mr. Frey. He suggested, as I remember, that I read that case because he said that it was a very curious case and a problematic one as far as this particular thing was concerned, and that I should read it and read it and get back in contact with him about it.

We would discuss its applicability.

Q Are you fairly certain as you sit here today that the Mesaroch case came up in your discussion with Mr. Frey on that conversation, the third and fourth of May? The reason I am asking is simply to help the record. It is my recollection -- it is my recollection that I didnot have any conversation with the Solicitor General at that point.

A What I am saying is that I was told that you had said in the Court on whatever day it was, you were talking in the courtroom in connection with Mr. Nadjari's application that the Solicitor General was likely going to question error under the Mesaroch case, and I communicated that to Mr. Frey so far as I can recollect.

MR. GLEKEL: I think the record should be clear that Mr. Dershowitz rather than Mr. Gordon has been supplying the precise dates of the conversation.

MR. DERSHOWITZ: I was trying to clarify whether or not those dates were accurate.

Q Can you tell us what Mr.Frey told you after this discussion between you and he about the Mesaroch case and the Nadjari lawsuit?

A After he had told me to read it and I called him back?

Q Yes.

A My recollection is that he took the view that this case, that is the Rosner case, was entirely different from the Mesaroch case, that in Mesaroch what appeared was that the Government witness had gone around framing people, substantively making up false testimony about crimes these defendants had purportedly committed and the Solicitor General had questioned error, if youwill -- no, had revealed that to the Supreme Court after certiorari had been granted. He thought that this was an entirely different matter because of the fact that Leuci's false testimony was on an entirely collateral point. There was no suggestion I believe that he had lied about what he said about Mr. Rosner and the Supreme Court had held in Mesaroch that they were not going

to send the case back for hearing on a new trial motion because if the District Court had denied the new trial motion the Supreme Court said they would be obliged to reverse that denial so they were going to take care of it right then and there, and his view was that that wasnot at all what we had here, but that Mesaroch was a rather curious case, probably because it involved the Smith Act, I think it was. It was a prosecution of Communists and that might have had some effect on the way the Court treated it.

Q In your conversations with Mr.Frey did Mr. Frey ever ask you the question as to whether or not the Government had any knowledge of Leuci's additional crimes at the time of the trial?

A I don't think he asked me because I think I told him.

Q What did you tell him?

A I told him that the crimes that we discovered that Leuci had lied about had not been kn own to us at the time of Leuci's false testimony.

Q When precisely did you first learn about the existence of the Goe memorandum?

A I don't know precisely. The way I recall the thing, it divides up into essentially two time segments. One is prior to the receipt of the Solicitor General's

memorandum in opposition to your or Mr. Rosner's petition for certiorari, and one is prior to that and one is subsequent to that.

I am quite convinced that I learned about this Go memorandum prior to our receipt of the Solicitor General's memorandum in opposition and it was the receipt of that memorandum which triggered the events which led to calling the Solicitor General about Leuci's admissions.

Q Was the receipt of the Go memorandum --

MR. GLEKEL: That was not his testimony, your Honor.

THE COURT: The question has not been put yet.

Q So it is your testimony that you learned about the G memorandum prior to calling and contacting the Solicitor General about Leuci's admissions?

A I believe that is correct.

Q And knowing of the existence of the Go memorandum you told the Solicitor General that the Government had no knowledge of Leuci's crimes at the time you denied them at trial?

A I think that misstates slightly what I said to the Solicitor General. I said to the Solicitor General -- Mr. Frey rather, the deputy, I said that we had discovered that Leuci had lied about crimes -- let me try to rephrase

that.

I said to the Solicitor General that Leuci had lied when he denied committing any crimes besides the one he admitted to.

We had discovered that he had lied and we had not been aware at the time of his false testimony of the crimes which he had falsely denied having committed.

That is what I said to the Deputy Solicitor then.

Q And at the time you told him that you were aware of the existence of the Goe memorandum?

A I think you'd better show me what it is you refer to, Mr. Dershowitz.

Q This is our copy of the Goe memorandum; it's not a complete copy.

MR. SAGOR: Your Honor, Mr. Dershowitz hasn't put it in evidence.

MR. DERSHOWITZ: This, I think, has been referred to as an exhibit.

MR. SAGOR: Court Exhibit 2-A of June 6th. I think that's the date.

THE COURT: Well, it's marked for identification, isn't it?

MR. SAGOR: I don't think he has ever marked it in these proceedings. We have no objection if he marks it at this point.

THE COURT: Well, mark it.

MR. DERSHOWITZ: Your Honor, the only hesitation is I have a marginal note in this particular copy and I do not intend to mark that marginal note in evidence, but for the Court's convenience I can have this marked.

In the meantime, can I ask for a copy of the redacted version of the letter that they sent to your Honor

on or about April 23rd?

MR. SAGOR: Your Honor, it's already been done.

MR. DERSHOWITZ: I know. I ask if they have a copy of it.

THE COURT: Do you have an extra copy of it?

MR. SAGOR: I don't know. If we do, we will certainly give it to him.

(Defendant's Exhibit H was marked for identification.)

Q Mr. Gordan, would you look at the following two pages and indicate whether this is what you refer to as the GOE memorandum in your testimony?

A I was certainly not shown a document that was a two-page document.

THE COURT: Look at it and see if you were shown anything that appears in that exhibit.

THE WITNESS: This looks like part of what I was shown by Mr. Sagor, that's right.

Q Could you tell us approximately how many pages the document you were shown by Mr. Sagor was?

A Well, it was certainly longer than this. My guess was that it would be five or six pages.

Q Do you have a copy of that?

A With me, no.

Q Do you have a copy in your office?

A No.

Q Can you describe with any more specificity the additional pages of the document you were shown by Mr. Sagor?

MR. SAGOR: I am going to object. That related to other people. The Court has a copy. I am sure the Court has compared the copy with the extract that relates to other individuals. No testimony with regard to Mr. Leuci's testimony.

THE COURT: It dealt with nothing other than what was concerned here; is that what you are asking?

MR. DERSHOWITZ: Tnis is the first we had learned about it. It had always been the representation of the Government to this very moment that this is the complete GOE memorandum with only names redacted.

MR. SAGOR: Absolutely not.

MR. DERSHOWITZ: This comes as a surprise to us.

THE COURT: I don't see how it could be. I was shown the original of the Goe memorandum. It relates to other people.

MR. DERSHOWITZ: We didn't see it.

THE COURT: Of course you didn't, because I redacted it.

MR. SAGOR: It's perfectly clear the first page has only one paragraph on it with the rest of the paragraphs taken out.

THE COURT: Go ahead.

Q Did you see a document which included the following two pages, among others?

A I believe so, Professor. I can't say positively, but that looks like what I saw. I did not read the whole memorandum.

Mr. Sagor, when he told me about it and showed it to me, pointed out the specific passage which I believe -- I am not positive -- was the one which you have just shown me in your document.

Q So that at the time you spoke to Mr. Frey, you had in mind the substance of what is contained in our redacted version of the Goe memorandum?

A Oh, no, sir. I don't believe so.

Q At the time you spoke to Mr. Frey, you had read the substance of what is contained in this Goe memorandum?

A That is my best recollection, yes.

Q And was it not your testimony a minute ago that it was this Goe memorandum that triggered your phone call and communication with Mr. Frey?

A No, sir.

Q The record will determine who is correct in that.

MR. GLECKEL: It was clear the reference to the memorandum was to the Solicitor General's memorandum and not to the Goe memorandum.

THE COURT: All right.

A I can clarify that for you.

THE COURT: Please do.

Q By all means.

A The way the conversation with the Solicitor General on April the 30th was triggered, as best I can remember it, is that a copy of the Solicitor General's memorandum in opposition to Rosner's petition for certiorari came into my office with a note from Mr. Sagor attached to it, and it said: "In view of the language in a footnote in the memorandum in response, don't you think we ought to tell the Solicitor General about"-- and I am paraphrasing the note -- "about Leuci's new admissions?"

And this was two or three days, as I remember it, after we had received that document. It should have come to me, but it was intercepted by the mail room and sent to Mr. Sagor instead, but he sent it up to me with a note.

I talked to him about it, talked to Mr. Curran about it, and I am telescoping the events a little bit, and in the end I made the call to Mr. Frey, but it was the

receipt of the Solicitor General's memorandum in opposition and the specific language that was contained in the footnote on -- I think it was Page 18, but I haven't looked at it in awhile, which triggered the telephone conversation with the Solicitor General, but certainly not that memorandum -- I mean the Goe memorandum.

Q Did there come a time when you received a draft copy of the Solicitor General's supplemental memorandum for use in the Rosner matter?

A Yes, about twenty minutes of 11:00 of an evening.

Q Did you read it?

A Yes, I read it.

Q Did you read the following statement in it:

"If a new trial determination should be made, it should be made only after hearing such new evidence as is available, including evidence bearing on petitioner's allegation, which the United States Attorney denies, and which is potentially critical to the disposition of the new trial motion, that there was knowledge on the part of or wrongdoing by the prosecutors in connection with false testimony by Leuci."

MR. GLECKEL: What document is Mr. Dershowitz reading from?

MR. DERSHOWITZ: The supplementary directive

of the Solicitor General's memorandum to the United States Special Prosecutor.

A Yes, I am quite confident I did. I don't remember reading it specifically, but it was presumably contained in the teletype and I read the teletype.

Q At the time that you read that statement, you had already read the Goe memorandum?

A Oh, yes.

Q And you were aware that the Government had knowledge of at least one crime that Mr. Leuci had not admitted to on the witness stand at his trial?

THE COURT: Just one minute, Professor. It's one thing to have the Solicitor General say that the prosecutor -- the prosecutor -- did not have knowledge of any such wrongdoing and for you then to proceed to substitute the word "Government" for "prosecutor." The difference is not lost on me.

MR. DERSHOWITZ: The word was not "prosecutor," may it please the Court.

THE COURT: What was it?

MR. DERSHOWITZ: "Prosecutors," in the plural, and in the footnote --

Q Are you aware of the following statement in the footnote where the Solicitor General substitutes the word

"Government" for "prosecutor" in "The absence of knowledge by the prosecution of Leuci's other criminal activities would render them inadmissible for impeachment purposes, since they would not have given Leuci an incentive to testify favorably to the Government if the Government was unaware of them"?

Did you read that footnote?

THE COURT: Anybody who has anything to do, or ever had anything to do with the prosecution of cases in the Federal Government realizes that"the Government" refers to the United States and the U.S. Attorney's Office representing the Government, and uses that expression as an alternative for "the United States Attorney."

MR. DERSHOWITZ: We disagree, your Honor.

THE COURT: It's not a matter of disagreement, sir. I have been practicing in this Court for over twenty years. It's not a matter of disagreement.

MR. DERSHOWITZ: We submit, your Honor, that's a matter of law to be determined by the Court; it's not a matter of practice.

THE COURT: That's ridiculous.

Go ahead.

Q Did you have any conversations with me personally during the course of these negotiations with the Solicitor

General's office?

A I don't believe so.

Q You don't recall having a discussion with me about these matters?

A No. You can refresh my recollection. I don't think we did.

Q Do you recall a proceeding at which we both sat at opposite counsel tables?

A Oh, oh, oh. You mean -- you mean after the memorandum had been filed?

Q Yes, after the Solicitor General's memorandum.

No, no, no. I am sorry.

Okay, let's get your testimony. Are you testifying that after the Solicitor General's memorandum was filed, we did have a conversation?

A Well, I remember spending some time in court with you, Professor. I don't remember a specific conversation. I argued an oral mandamus petition against you in the Court of Appeals.

Q You recall no conversation preparatory to that argument in the Court of Appeals?

A I remember you called me up from upstairs and said -- or maybe you called Elliot. The only thing I remember is you telling me you had paid the $50 fee to file

petition. I am not saying it didn't happen; I just don't have a specific recollection.

Q Did you and Mr. Sagor ever have any conversations as to what you would tell the Solicitor General when the matter came up, that you felt the necessity of telling the Solicitor General something?

MR. GLECKEL: Your Honor, I think the question is unclear.

MR. DERSHOWITZ: Let me try to clarify it.

Q Did you and Mr. Sagor ever have any conversations relating to what you would tell the Solicitor General in the Rosner matter?

A I assume so, but I don't know what they were.

Q You recall no conversations specifically with Mr. Sagor about that?

A I remember that we discussed that we would tell him about what we were finding out. It seems to me that's what we were going to tell him. But I don't specifically recall talking to Mr. Sagor about precisely in what manner he would be told.

I had, I think, two conversations with Mr. Frey on the telephone when Mr. Sagor was present in the room at my request to correct any mistakes that I might make in talking to him. I don't recall whether he was present

when I initially -- when I made my first call to him about the matter or not.

I said I do not know.

Q Do you recall having any discussions with Mr. Sagor at all about the Goe memorandum?

A Oh, yes.

Q Can you tell us what these conversations were and when they occurred?

A Well, the only time that I remember ever talking to Mr. Sagor about the Goe memorandum -- the Goe memorandum, as you call it, was, as I say, prior to the receipt of the Solicitor General's memorandum in opposition, it occurred in Mr. Sagor's office, and he showed me, as I said, a five or six-page memorandum, to a portion of which he directed my attention, and it had to do with Leuci's having gotten $50 in 1964 or '65 in connection with some official activity, and he had gotten it illegally. He had taken it, and so had the people with him; each had gotten $50 out of $200.

Mr. Sagor said that this was 3500 material which had not been turned over to Mr. Rosner at the time of trial, and that when Mr. Leuci had testified to his misdeeds at trial, he had not included that misdeed, the one disclosed in the memorandum, among those that he admitted, and I said

to Mr. Sagor -- well, no, I think Mr. Sagor advised me that he had not known about this thing, and I said to him that it was very unfortunate that we had not turned this thing over, and it was one in a succession of important cases where there had been a failure to turn over 3500 material.

I asked him why it was 3500 material in the first place, since it seemed to have nothing to do with Mr. Rosner at all, and Mr. Sagor said, because we had elicited in our direct examination of Leuci what crimes he had committed, and I asked Mr. Sagor whether he had asked Mr. Leuci why it was that when asked about the crimes he had committed he had not included this one in what he related to the Court, and Mr. Sagor said he had asked Mr. Leuci why he hadn't testified to this, and Leuci told him he had forgotten about it.

I recall asking Mr. Sagor whether, in fact, it was not true that Mr. Leuci had admitted to crimes when he had testified in the trial of Mr. Rosner, and Mr. Sagor said he had, and I don't recall whether Mr. Sagor told me what they were or whether I simply asked him, "Well, were they more serious than this or not?" And the general impression I came away with, whether it was through specific examples that he gave me or through a general conclusory

statement, was that Mr. Leuci had admitted to crimes that were far more serious than about this $50 portion of the money that had been found as referred to in the memorandum.

Q Do you recall whether Mr. Sagor told you how many crimes Mr. Rosner had admitted to at trial?

A I don't think Mr. Rosner admitted to anything.

Q I'm sorry. Mr. Leuci admitted to at trial?

A The number 4 sticks in my mind, but I don't remember whether Mr. Sagor told me that or whether -- I worked on the brief on the appeal. It may be that I found out about it then, or subsequently. The number 4 sticks in my mind.

Q Do you recall the gist of your conversation, from reading the brief or working on the brief, the nature of crimes that Mr. Leuci had admitted to at trial?

A Frankly, what refreshed my recollection was the conversation I had with you on the telephone last week. I don't think I remembered until that time what it was that Leuci had admitted to doing. I may have known it at one time -- Mr. Sagor may have told me, but I don't -- until we talked last week, I did not remember if I ever knew hwat it was that Leuci had admitted to.

Q Can you recall the date of this conversation with Mr. Sagor?

A No.

Q Do you remember approximately when it was?

A Well, by sort of complicated reasoning back, the best I can do on the date -- I have been trying to remember -- is this: It was before the receipt of the Solicitor General's memorandum in opposition to your or to Mr. Rosner's petition for certiorari, and when that came into the office, the mail room, I guess, stapled a white piece of paper on it and time-stamped it, and I received this document from Mr. Sagor two or three days after -- not the Goe memorandum, the Solicitor General's memorandum, two or three days after that.

It was certainly prior to the receipt in the office of the Solicitor General's memorandum, and my best recollection is that that memorandum was time-stamped in sometime around the 22nd of April. It would hav e been before then.

Q Could you tell us where that time stamp currently exists -- where that memorandum with the time stamp exists?

A No -- with the time stamp on it?

Q Yes.

A No. I have inquired and I was told it can't be located. I asked this morning so I could see.

Q Could you indicate whom you inquired of?

A Mr. Gleckel.

Q And Mr. Gleckel told you he could not locate the time-stamped memorandum for you?

A That's correct. But I believe that it would have been the 22nd of April. That's my best recollection, because I can remember thinking that it was eight days between the receipt of the memorandum in the United States Attorney's office and the communication with the Solicitor General initially on this subject, and I am very clear that it was the 30th of April when I communicated with him.

Q So it is your testimony then that it was about the 22nd that you received the Solicitor General's memorandum and the --

A Excuse me.

Q -- and that the office received the Solicitor General's memorandum and that you received the Goe memorandum several days prior thereto, or saw the Goe memorandum several days prior thereto?

A It was before then. How long before then, I don't remember. It would certainly have been in the month of April, but when in the mongh of April, I have no idea.

Q Could you estimate? Was it two or three days

before receipt of the memorandum, or about a week or two before the receipt of the memorandum?

A I really don't remember, Professor. I have been trying to.

Q Would April 15th be a reasonable approximation?

MR. GLECKEL: Your Honor, the defendant has already testified to his best recollection on that.

THE COURT: Overruled.

MR. SAGOR: "The witness."

MR. GLECKEL: The witness.

A I do not remember, Professor. It was not too long before.

Q Think hard about the chronology of events and try to remember now whether you received the Goe memorandum before or after you learned about Leuci's statements, firm statements of crime, to Mr. Jaffee, Mr.Puccio, Mr. Giuliani.

A As I say, I don't remember.

I certainly remember that I knew -- my first knowledge, as I recall it, of any problem about the Posner new trial motion or anything else was this conversation I had with Mr. Curran about, you know, the hypothetical, which I related to you previously. That was the first time, as I remember, that I knew anything about it.

Q So it is your testimony that your knowledge of the Goe memorandum or the material contained therein came after your first conversation with Mr. Curran, which was the hypothetical conversation, and before you learned about the specifics of the Leuci recantation?

A No. It was before -- it was after I first spoke with Mr. Curran about the fact that there was a developing problem here, and before the receipt of the Solicitor General's memorandum in opposition, sometime in that period, and I can't pin it down much more precisely.

Q And as you sit here today, you cannot remember whether the Goe memorandum came to your attention before or after the specifics of Mr. Leuci's statements to the three U.S. Attorneys I mentioned was brought to your attention?

A No.

Q Would looking at the time sheet that is not now available refresh your recollection about that?

A I don't know what you mean.

Q You mentioned in your testimony that there was a time stamp on a document.

A No, no. That's the date I have been trying to explain to you. It was before the time stamp. I am very clear that it was before the time stamp, before the receipt of the memorandum, and after my first being told by Mr. Curran that there was a problem with Mr. Leuci, but where exactly it fits into that time sequence I do not know.

Q When you first learned of Leuci's firm statements that he admitted more crimes, did you discuss with anybody in the United States Attorney's Office at that point whether or not that information should be made available to the Supreme Court?

A I don't believe so, no.

Q So there was a period of time in which you learned and knew about the Leuci "recantations" -- to use a shorthand without characterizing it -- which you did not have in mind to notify the Supreme Court?

A Yes.

THE COURT: Let me ask you this: How long a time elpased between the time Leuci said he had committed

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other crimes and the time you notified the Deputy Solicitor? Is that question clear to you?

THE WITNESS: I would like to make a distinction which I have in my own mind. The thing that differentiated the Goe memorandum information with the information that Mr. Leuci had lied about other crimes was that so far as I was concerned, and so far as I am concerned today, though I don't know what Mr. Leuci testified to here, he did not lie when he omitted receiving the $50 from his testimony at the trial. I considered that an error on his part compounded by our failure to turn over the 3500 material and put it in an entirely different category from the fact that he had engaged in all kinds of unlawful criminal activity which he had deliberately lied about not having engaged in at Mr. Rosner's trial.

THE COURT: How long a period of time elapsed between the time you learned of these other multitudinous crimes from the time you notified the Solicitor General?

THE WITNESS: Taking the 18th and the 19th, April 18th and 19th, as the key date when Leuci actually admitted to these things, I don't specifically recall, I would have learned it in the new few days, no more than 10 at most, between the night of the 18th, or 19th, if that's when he first admitted it, and the 30th, which is the day

I called Mr. Frey.

THE COURT: Can you give us any idea how long you knew about the fact that he was admitting many, many other crimes in which he had been involved about or which he had lied about at the trial and the time you spoke to Mr. Frey in the Solicitor General's Office?

Is my question clear?

THE WITNESS: That he had admitted rather than there was a probability --

THE COURT: I am eliminating the hypothetical question.

THE WITNESS: When I knew?

THE COURT: How long a period of time elapsed between the time you knew and the time you contacted the Solicitor General?

THE WITNESS: No more than 10 or 12 days.

BY MR. DERSHOWITZ:

Q Is it not your testimony that it was the Solicitor General's memorandum that triggered your sense of obligation to inform the Solicitor General?

MR. GLECKEL: Objection, your Honor. It is a characterization.

THE COURT: I will permit it.

A It was the Solicitor General's memorandum --

In fact, it was Mr. Sagor's suggestion in connection with that memorandum that triggered my agreement with Mr. Sagor that the Solicitor General should be advised. I had never seen any papers in connection with the Supreme Court proceedings prior to Mr. Sagor giving me the Solicitor General's memorandum. In fact, I have never seen the petition for certiorari to this day.

Q It is your testimony that were it not for the Solicitor General's memorandum having been brought to your attention you did not then have any current intention to bring the material to the attention of the Supreme Court?

MR. GLECKEL: Objection. It is a hypothetical.

THE COURT: Sustained.

MR. DERSHOWITZ: I am asking about state of mind, your Honor.

THE COURT: He has told you that the Solicitor General's memorandum triggered the events.

MR. DERSHOWITZ: What I am asking --

THE COURT: I will ask a question:

Was there ever any discussion which you participated in, or which you heard in the office of the United States Attorney, that information as to Leuci's previously unadmitted crimes should be withheld from the Solicitor General?

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THE WITNESS: No, sir.

THE COURT: Proceed.

BY MR. DERSHOWITZ:

Q Was it not your testimony just a few minutes ago that you, in fact, called Mr. Frey and told him that it was the position of the Government of the United States through the Southern District United States Attorney's Office that that information should not be made available to the --

THE COURT: That's a totally different question.

MR. DERSHOWITZ: I think I am entitled to ask that question.

THE COURT: Don't argue with me. I am well aware that he made that statement. The question I asked him was, in effect, whether there was ever any conversation at which he was present where talk of withholding this information from the Solicitor General was discussed. He said no. You reverted to a previous question and answer of his in which he said in discussing what the legal position of the United States ought to be the United States Attorney took the position that in light of the new trial motion the matter should not be brought to the attention of the Supreme Court.

I take it that from the testimony, as I remember it, and correct me if I am wrong, Mr. Gordan, within a day

or two after that the Nadjari thing came out, and you immediately at that time called the Solicitor General and told him that whatever reasons there had been, namely, the ongoing investigation and keeping it secret, no longer existed?

THE WITNESS: That's correct, sir.

THE COURT: Go ahead.

BY MR. DERSHOWITZ:

Q Is it not the case, then, that there was a distinction made by the United States Attorney's office in this district to tell the Solicitor General that it was the position of this office not to tell the Supreme Court about the Leuci statements until after the investigation was completed?

MR. GLECKEL: Objection. I believe the witness has already testified --

THE COURT: I will permit the witness to answer that.

A I think we asked -- yes. I think we said to Mr. Frey -- I did, after talking to Mr. Curran -- that we wished he would not not make public the information that we were developing about the other crimes Leuci was involved in. I think when I made the request there were various -- Mr. Frey may have suggested there were various ways we could

go about it, including just a letter to the Court without a copy to counsel, to you, I mean. I don't remember that specifically. We were more concerned about it becoming a matter of public knowledge, particularly, as I remember it, because of the fact that there was a man who worked for Mr. Rosner who -- I mean at the time, just these past few months -- who was a particular subject of the ongoing investigation, and we felt most particularly he should not be aware that Mr. Leuci was cooperating with the government.

Q Mr. Gordan, you are a lawyer in this office who has dealings primarily with the Solicitor General in the Supreme Court?

THE COURT: Excuse me.

Try to think back clearly as to this. Was it your position with Mr. Frey that you did not want the information about Leuci's admissions to become public, or that you did not want it available to the Supreme Court? Do you remember?

THE WITNESS: I think we did not want it to become public. I don't think it had occurred to me until Mr. Frey mentioned the possibility that it could come to the attention of the Supreme Court without becoming a matter if not a public knowledge at least of Mr. Rosner's

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knowledge.

THE COURT: Did the United States Attorney ever, to your knowledge, when it came to your attention that it might come to the Supreme Court without being public, ever ask the Solicitor General not to make the information available to the Supreme Court?

THE WITNESS: Well, I think I have to answer the question this way: The conversation which I had with Mr. Frey about not making the matter public occurred late, about 6.30, on April 30th, and we discussed various possibilities of how to handle the thing. One was that it was possible, Mr. Frey said, that a letter could be written to the Supreme Court saying in it,"We are not telling Mr. Rosner's lawyers about this information." This was one of the possibilities discussed, but within, as I remember it, 24 hours -- in fact, within about 18 hours -- Mr. Hadjari had a press conference and released the thing, so that was never developed further because of the change in circumstances.

THE COURT: When Mr. Frey said to you that it might be done by letter to the Supreme Court, did you say anything to him, if you remember?

THE WITNESS: I don't really remember, your Honor. I don't know how seriously he put forward that

suggestion.

THE COURT: It seems to me implicit in your testimony so far is the fact that this was under discussion between youand the Solicitor General, that before the matter -- before the decision was firmly fixed, Mr. Nadjari's proceedings broke, or had by then the Solicitor General come to a conclusion as to what he was going to do, to your knowledge?

THE WITNESS: The last communication I had before the thing, before Mr. Nadjari made the matter public, was after I had expressed our desire that it not be made public Mr. Frey said, "Well, we will see," in a very tentative manner, and that concluded the conversation until I called him the next day and advised him about Mr. Nadjari.

THE COURT: Did the decisions of the United States Attorney bind the Solicitor General of the United States?

THE WITNESS: I don't have that impression, no.

BY MR. DERSHOWITZ:

Q We have discussed whether or not the Solicitor General had made up its mind, its collective mind, as to whether to bring this to the attention of the Supreme Court. Was it not your testimony that Mr. Curran had told you that it was the position of this office vis-a-vis the Solicitor

General that it did not want that made public?

MR. GLUCKEL: Objection.

THE COURT: Overruled.

A I will have to ask that that be read back.

Q The Judge asked you whether or not the Solicitor General had made a decision and your answer was that it was up in the air. I am asking you now whether this United States Attorney's Office, Mr. Curran and yourself, Mr. Curran particularly, whether he had not communicated to you the decision that he had made that he did not want this matter made public?

A Yes. He asked me to ask Mr. Frey -- to communicate to Mr. Frey, rather, the fact that we did not want Bouci's cooperation and admissions to become a matter of public knowledge. That was the purpose of the telephone call.

Q Did your discussion with Mr. Curran include the possibility of bringing this to the attention of the Supreme Court without alerting counsel to it?

A No, because after I had discussed that with Mr. Frey it must have been about -- I don't honestly remember. It was quite late in the evening. I don't remember whether I ever discussed Mr. Frey's suggestion with Mr. Curran again or not.

Q In your discussion with Mr.Curran before you spoke to Mr. Frey when he instructed you to communicate to the Solicitor General the position of this United States Attorney's Office, was it part of his instruction to you to raise the question of the possibility of alerting the Supreme Court to this matter without alerting Rosner or his counsel?

A I don't think it occurred to either one of us.

Q So it was the position of the United States Attorney's Office at that time that no information about Lauci's crimes should be brought to the attentionof the Supreme Court at that time?

MR. GLEKEL: That was not --

THE COURT: Sustained.

Is that what you said?

THE WITNESS: We did not want the information made public or I was instructed --

THE COURT: That's what I understand.

MR. DERSHOWITZ: I am pressing it a little further to find the implications of that position.

THE COURT: Go ahead.

BY MR. DERSHOWITZ:

Q Was it not then the position of the United States Attorney's Office as you had thought it through that there-

fore this information should not at that time be brought to the attention of the Supreme Court?

MR. GLEKEL: Objection. This is completely unclear.

THE COURT: It is implicit in the question that the only way the Supreme Court could have been informed was through the Solicitor General.

You may answer.

(Record read.)

A That's correct. It never occurred to me that anything could be brought to the attention of the Supreme Court without telling opposing counsel.

Q You are the chief appellant counsel here and probably most familiar with the workings of the Supreme Court in this office. Are you familiar with the approximate timetable that the Supreme Court works under, that is, do you know approximately when the Supreme Court generally disposes of a case in its Friday conferences. How long after receiving the government's final memorandum does it dispose of the case in the normal course of events?

A I have no idea.

Q Do you know whether or not it is three or four months as distinguished from a week or ten days?

A No. I know practically nothing about Supreme

Court practice, Professor.

Q Had you not on occasion been told that certiorari in a given case has been denied?

A Sure. I read about it in a paper.

Q Are you not normally told about it in cases in which you have had some experience?

A We get a blue memorandum from the Solicitor General. It is a form and somebody types in a mark next to "Certiorari Denied," and back it comes.

Q You have occasion, at least, of knowing when the government's memorandum in some of those cases has been filed?

A I guess I have known. I have never thought about the time lag between the two of them.

Q Was it your view at the time that the time lag was closer to several weeks or say a year?

MR. GLEKEL: I don't understand the relevancy of this line of questioning.

THE COURT: Neither do I.

MR. DERSHOWITZ: May I make an offer of proof?

THE COURT: Yes.

MR. DERSHOWITZ: The Supreme Court was scheduled in the normal course of events to decide and dispose of certiorari petition within about ten days or two weeks after

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receiving the final government memorandum. Our offer of proof is that the United States Government, this United States Attorney's office, contemplated not telling the Supreme Court of the United States about the Leuci memorandum until an investigation was complete and that it was inevitable that the Supreme Court would have acted on certiorari without having received that information.

THE COURT: Overruled.

Go ahead.

THE WITNESS: Is there a question, your Honor?

Q The question is, are you generally aware, in the most general way, of what the time frame is of the Supreme Court action?

A No.

Q Would it surprise you to learn that the Supreme Court generally puts its case on conferences within about two weeks or three weeks?

MR. GLECKEL: Objection, your Honor. If Mr. Dershowitz wants to testify, he can. The witness has said --

THE COURT: Sustained.

This witness said he doesn't know about the practice, in answer to your question.

Q Did you have any discussion with any other Assistant United States Attorneys in this office about the certiorari petition and the matter pending before the Supreme Court in this case?

A In what respect?

Q With respect to the decision whether to disclose and when to disclose information.

A Besides Mr. Curran and Mr. Sagor, I don't think I have discussed the matter with anyone. It's possible I mentioned it in passing to Mr. Schaffer, to see the assistant chief, but I don't think I ever had any substantive

conversations with him.

Q At the time that you decided to inform the Solicitor General's office about the nature of the Leuci recantations, did you advise Mr. Curran or anybody in the United States Attorney's office that it was your legal view that this would not result in the Supreme Court reversing the conviction?

MR. GLECKEL: Objection, your Honor. I don't see the relevance of this.

THE COURT: I will permit it. Go ahead.

A I don't remember. I think I was more likely in expressing my own legal view communicating the views of the Solicitor General as I had been advised of.

Q Was it your view at the time, as you recall it, the Supreme Court would not grant a new trial motion, would not in fact remand the case for a new trial?

A I think that was my view. I had some uncertainty about the matter because the Mesarosh case was so peculiar, but that was what Mr. Frey thought, and I deferred to him in such matters.

Q Now, you mentioned in your testimony a few minutes ago that when the Government merely knows about evidence in the file, and there is no deliberate lie about the witness, and that is, and I think I am quoting

you correctly, "an entirely different category of case." Do you recall having said that?

A I think I have said it in connection with this, but I think of the Goe memorandum as being in an entirely different category from Leuci's recantations, as you put it.

Q Now, within that category of cases, to your knowledge, as an experienced Appellate attorney, do Courts ever reverse those kinds of cases?

MR. GLECKEL: Objection, your Honor. It isn't up to the --

THE COURT: Sustained.

Q Are you aware of any cases where the Government has had knowledge, collectively, within the Government, of information not testified to by the witness where the Courts hav e reversed convictions?

MR. GLECKEL: Objection, your Honor.

THE COURT: Read the question to me, please.

(Record read.)

THE COURT: Overruled.

You may answer.

A Well, I knew -- there are several cases where the Government has deliberately introduced perjured testimony or has engaged in various other kinds of --

THE COURT: I think the stance of the question, Mr. Gordan, comes down to this: He is asking you in substance, supposing there is information in the Internal Revenue Service not known to the people in the U.S. Attorney's office, do you know of any convictions that have been reversed on the grounds in substance that the information in the possession of the Revenue Service was constructively in the possession of the U.S. Attorney. That I understand to be the gist of the question.

MR. DERSHOWITZ: Yes.

THE WITNESS: I don't think so.

Q Are you aware of the category of cases known as negligence suppression cases?

A Oh, yes. One of them was a case where I was supposed to have been --

Q Do you remember the disposition of that case?

A Yes. The Court of Appeals held that there had been no suppression of any kind.

You were counsel in the case, Professor.

THE COURT: What was the name of that?

MR. DERSHOWITZ: I was trying to remember, myself.

THE WITNESS: United States v. Kahn, your Honor.

MR. DERSHOWITZ: Let the record reflect I had no

role whatsoever in that aspect of the case. I was retained for an entirely different matter.

Q But you are aware that there is a category known as negligence suppression, in which the Courts sometimes reverse convictions?

MR. GLECKEL: Objection, your Honor. I still don't see the relevance of this line of questioning.

THE COURT: I do.

Overruled.

A Yes, certainly. There are cases where no matter with what good faith the prosecutor has acted, if the matter is important enough and has not been disclosed and should have been, the Court will grant a new trial. Certainly.

Q Were you aware of that line of cases when you read the Goe memorandum?

A I have been aware of it ever since the Kahn case, Professor, if not before.

Q Were you aware of that when Mr. Sagor told you that in his view the Goe memorandum constituted 3500 material?

A Was I aware of it then?

Q Of the line of cases,when Mr. Sagor told you that the Goe memorandum in his opinion constituted 3500 material?

A Yes.

Q Do I understand your position to be that the reason you did not feel it necessary to disclose the Goe memorandum to the Solicitor General --

MR. DERSHOWITZ: I withdraw that question. Let me rephrase it.

Q It is a fact, is it not, that you have never, to this day, informed the Solicitor General of the United States, or any of his deputies, about the existence of the Goe memorandum or its substance?

A That is correct.

Q Is it your position that the reason you did not feel it necessary to inform the Solicitor General about that is that Leuci's new admissions of major new crimes made that a minor event by comparison?

A Not per se.

Q Would you explain to us what your position is?

A My position is based upon the memorandum itself and the facts contained in it, not upon the other admissions by Leuci. As I understood it, and I don't know what's transpired at this hearing -- as I understood it, Mr. Leuci had admitted to having taken $50 in 1964 or '65 in connection with some official activity. He had taken it wrongly. That fact was recorded in a memorandum

which was in the possession of the Bureau of Narcotics and Dangerous Drugs prior to the Rosner trial.

At the Rosner trial, the Government elicited on direct examination of Leuci what crimes he had committed or what bad things he had done, and Leuci admitted to things much more serious than taking the $50. The prosecution, the United States Attorney's Office, was unaware of the existence of the memorandum, and didn't turn it over to Mr. Rosner's counsel, thereby violating Section 3500 of Title 18, but my view was, and continues to be, that in view of Mr. Leuci's testimony at the trial itself in connection with the things he did admit doing, that memorandum and the facts contained in it are of such little significance that there was -- that there was no necessity to inform the Solicitor General of its existence, and there -- if I can express a legal opinion -- there would be no reason to grant a new trial.

THE COURT: I have already indicated in the record of this matter that I regard the Goe situation as de minimis.

Go ahead.

Q Is it your view, then, as I understand it, that you would not feel obligated to turn over the Goe memorandum to the Solicitor General without regard to whether or not

Leuci made later recantations?

A Well, if your question is would I have told the Solicitor General about the Goe memorandum, if the case had been proceeding normally, without the subsequent admissions by Leuci, no, I certainly would not have. In fact, as I say, I didn't.

Q Were you aware that at the trial of Mr. Rosner there had been an issue concerning the destruction of certain tapes in which Mr. Leuci had made admission of certain crimes?

MR. GLECKEL: Objection, your Honor. This seems totally irrelevant.

THE COURT: I don't see the relationship.

MR. DERSHOWITZ: The offer is Mr. Gordan made a characterization as to what his belief was of the trial. He said that he merely testified -- he testified as to many crimes, and what I would like to elicit is the precise nature of what Mr. Gordan knew about the record of the case at the time he made this decision.

THE COURT: Sustained.

Q Are you aware that in addition to Mr. Leuci testifying at the trial, he had also testified about his crimes at an interview prior to the trial, granted by the Government with the consent of the Government and with

Rosner's counsel?

A I don't think so.

Testified?

Q He had spoken at an interview, been questioned in an interview and given answers to questions.

A Before trial?

Q Yes.

A I don't think I remember until just this moment.

Q As you sit here today, do you know that an Assistant United States Attorney by the name of Shaw had knowledge, pretrial, of the substance of the Goe memorandum?

A I have been told that.

Q Precisely when were you told that?

A I was told that on Saturday -- Saturday, July 7, 1974, sometime after 9:30.

Q A week or two ago?

A Yes. Mr. Gleckel told me that when I got back. I didn't know it before then.

Q In your view, is that fact a significant one?

MR. GLECKEL: Objection, your Honor.

THE COURT: Sustained.

I will decide what is significant in this matter. That's my job.

MR. DERSHOWITZ: It seems to me when we are

talking about motive and intention --

THE COURT: Let's don't argue, Professor.

MR. DERSHOWITZ: I would like to make an offer of proof.

THE COURT: I don't want to hear it.

Go ahead.

Q It is your testmony then that in your discussions with Mr. Sagor, Mr. Sagor never told you that Shaw, an Assistant United States Attorney, had knowledge of the substance of the Goe memorandum?

MR. SAGOR: Objection, your Honor. There is nothing saying whether Sagor allegedly knew this or anything like that.

MR. DERSHOWITZ: That's not part of the question. The question is whether he, Sagor, told him.

THE COURT: Do you have the question in mind?

THE WITNESS: Yes, sir.

A I only had one conversation with Mr. Sagor about that memorandum, the one I have related, and he certainly did not tell me that Mr. Shaw knew about the facts contained in the memorandum. No, he did not.

Q Did he tell you that that information was solely in the possession of the Bureau of Narcotics and Dangerous Drugs?

A I don't think we discussed it specifically. He showed me a memorandum which appeared to be an internal memorandum of the Bureau of Narcotics and Dangerous Drugs. I had the distinct impression that Mr. Sagor had been unaware of the existence of that memorandum at the time of the trial.

Q But at the time that you and Mr. Sagor discussed the substance of the Goe memorandum, the impression, I take it, you gathered from that discussion was that the information was contained solely in the files of the Burea of Narcotics and Dangerous Drugs?

A That was certainly the impression.

Q I take it from the testimony you have given here today that it is your view that there is a distinction between knowledge contained in the possession of the Bureau of Narcotics and Dangerous Drugs and knowledge contained by an Assistant United States Attorney?

MR. GLECKEL: Objection, your Honor. This can't possibly go to his motive or intent, since he has testified that he learned about this after the conversation with the Solicitor General.

THE COURT: I am going to permit it.

The point of the question is clear. I understand the point.

Go ahead.

THE WITNESS: I'm sorry, your Honor.

THE COURT: Read the question.

(Record read.)

A Well, do you mean that I take a distinction between the fact that the memorandum was known to the BNDD and not to the United States Attorney's Office? Is that your question?

Q Yes.

A Yes, I certainly do take such a distinction.

Q Is that distinction a significant one, in your view?

MR. GLECKEL: Objection, your Honor. I don't think it is for the witness to draw conclusions of law.

THE COURT: I will permit it.

A I think it's significant. I don't think it's -- I don't think it would be controlling if the substance of the memorandum was significant. In other words, I think that if the memorandum had contained something of vital importance it wouldn't have mattered where the memorandum was so long as it was in the possession of the Government.

Q But if the memorandum contained something that was not of vital importance it might make all the difference

in the world as to where it was in the Government's files?

A No, I don't think so. I would say that it's a -- the way I view it is, it's kind of a sliding scale. If the memorandum is irrelevant, is of no importance, and it was in Mr. Sagor's vest pocket during the trial, a new trial would not be granted. If it was of slight importance, or more important than no importance, but Mr. Sagor in the prosecution didn't know about it, a new trial might not be granted. If the memorandum was of vital importance to the trial, and the prosecutor did not know about it, but it was somewhere in the Government, then I think that the fact that the prosecution didn't know about it would not foreclose the granting of a new trial.

Q So, in light of your characterization of this material as not very important, it might be very significant how high up the hierarchy the actual information got?

MR. GLECKEL: Objection, your Honor.

THE COURT: Sustained. I think we have rummaged around in Mr. Gordan's mind there just about enough.

Go on to something else. Because in the long run, in the opinion I ultimately hand down, I shall decide the very question you are putting to him.

Go ahead.

And while I am influenced by what he says,

I don't believe that his position is determinative.

MR. DERSHOWITZ: Excuse me, your Honor. While we are conferring, we would like very much to see if we can have copies of the two letters written by the Government to your Honor, that is, the letter first informing your Honor of the Leuci material, and then the letter which was the subject of the mandamus proceeding. We are particularly interested in the latter, that is, the letter sent to you on Monday night, which you read and indicated could not be disclosed, which last week you ordered a redacted copy to be turned over to us.

THE COURT: You got that?

MR. DERSHOWITZ: We got that. We do not now have a copy of that.

THE COURT: Why don't we take the morning recess now and see if we can't then -- perhaps then you can be able to finish with this.

Ten minutes. Let me know when you are ready, please, but not more than fifteen minutes.

(Recess.)

(In open court.)

MR. JAFFEE: Your Honor, may the record reflect that we have furnished to defense counsel Exhibit 13, which is a copy of the redacted letter of May 28th that was

previously furnished. We have also furnished a copy of what is now marked Exhibit 16, which is a copy of the April 23rd letter from Mr. Curran to your Honor, that copies or portions of both those letters were read into the record at Mr. Sagor's -- when he was on the stand -- and if the defense wishes, we will put them in as Government's Exhibits as Exhibits 13 and 16 in evidence. We offer them at this time.

MR. DERSHOWITZ: We would like to introduce them in evidence and we would also like to introduce in evidence the Goe memorandum.

MR. JAFFEE: No objection.

THE COURT: Received.

MR. DERSHOWITZ: The redacted version.

(Government's Exhibits Nos. 13 and 16 were received in evidence.)

MR. DERSHOWITZ: We would also like to makr for identification the letter of May 7, 1974 sent to Mr. Frey from Mr. Gordan, provided to us also by counsel during the recess.

THE COURT: Any objection?

MR. SAGOR: No, your Honor. I suggest that they be marked Government's exhibits; that will simplify matters. The Goe memorandum should be marked Government's

Exhibit 17 in evidence and the letter of May 7th should be marked Government's Exhibit 18.

xx (Government's Exhibits Nos. 17 and 18 were received in evidence.

MR. SAGOR: I take it you were also given other correspondence. You don't mean to say 18 is the only correspondence you received?

MR. DERSHOWITZ: If you would like. I am not going to make any reference to it. If you would like to mark it as an exhibit --

MR. SAGOR: No. Just so the record reflects that's not necessarily all the correspondence.

Q Calling your attention to this letter of May 7, 1974, I ask you to look at it.

A You mean Exhibit 18?

Q Yes.

A (Pause.) Yes?

Q Read into the record the items you supplied the Solicitor General at his request.

A Notice of motion; defendant's affidavit; defendant's memorandum of law; government's affidavit in opposition; government's memorandum of law; excerpt of the record; government's supplemental affidavit in regard to the first new trial motion in the Rosner case.

Q So, inother words, the government requested that you send to them a significant amount of material relating to Rosner's motion?

MR. GLEKEL: Objection, your Honor.

THE COURT: Sustained.

Q Do I understand that that list is exclusive, that you did not send the government anything other than that is marked in that list?

A That is correct.

Q Indicate what else you sent.

A You mean the Solicitor General?

Q Yes.

A There is a second letter of the same date which refers to sending many other things that has been given to you.

Q That's Mr. Curran's affidavit?

A I would have to see the letter. I don't specifically recall.

MR. SAGOR: May that be marked Government's Exhibit 19 for identification, your Honor?

(Government's Exhibit 19 marked for identification.)

Q Please proceed.

A Government's Exhibit 19 was sent before Government's Exhibit 18, though, apparently, on the same day and forwarded to the Solicitor General, the papers on Rosner's third new trial motion as well as a copy of an affidavit by Mr. Curran.

Q You indicated that the triggering event was the Solicitor General's reply memorandum in which a certain footnote had stated certain facts. As you sit here today, to the best of your recollection, in substance, what did that footnote say?

A It had something to do with the allegation that Louci had committed other crimes and it said that there was nothing in the record to suggest that Louci had committed

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other crimes. That's my recollection of the footnote.

Q At the time you read that memorandum and focussed your attention on that footnote, indicating that there was nothing in the record that Leuci had committed other crimes, you were aware that Leuci had admitted pretrial to at least certain representatives of the government that he had committed another crime?

THE COURT: What do you mean "pretrial"?

MR. DERSHOWITZ: Before the trial.

THE COURT: You mean about the Goe situation again?

MR. DERSHOWITZ: Yes.

A I can't say that it was in my mind when I read it. I don't imagine it was. I knew about it. I had been advised by Mr. Sagor.

Q Did there come a time when your attention was called to a letter sent to the Honorable Judge Bauman on April 23, 1974?

MR. SAGOR: Is that Exhibit 13, Mr. Dershowitz?

MR. DERSHOWITZ: Yes.

Q Is that Exhibit 16?

A Yes, it is.

Yes, that did come to my attention.

Q Do you recall reading the following statement?

"This is to inform the Court that for the first time last week Mr. Leuci told the governmentof certain criminal acts committed by him when he was a member of the Narcotics Division of the New York City Police Department about which Mr. Leuci did not testify at the trial of Edmund Rosner."

A Your question is --

Q Were you aware of that statement when you read that letter?

A I have read the letter.

Q You are aware of the date of the letter, April 23?

A Yes.

THE COURT: If "the government" means anything other than the legal representative of the United States --

I had previously indicated to you that that is a common, indeed, a universal, form of referring to the government's counsel. Invariably, day after day and from immemorial the United States Attorney, when he stands to speak, speaks for "the government."

Indeed, I may point out, Professor Dershowitz, that a few moments ago you in referring to the Solicitor General at first referred to him as "the government," and then you corrected yourself.

MR. DERSHOWITZ: I refer to the FBI as "the government"; I refer to the Bureau of Narcotics and Dangerous Drugs as "the government." That's obviously insignificant. The government is one unit for at least certain purposes and we will bring to your Honor's attention various cases sobolding, but that's not the point of this question.

Let me develop it this way:

Q On April 23 you were aware of the statement by the government indicating that for the first time last week, that is, around April 17th or 18th, the government -- defined as Judge Bauman defines it, as the United States Attorney's Office -- was first told of certain criminal acts committed by him about which he did not testify at the trial of Edmund Rosner.

MR. GLEKEL: Objection. The question is unclear.

THE COURT: There is no question yet.

Q In reading this letter dated April 23, did you focus on the statement, or do you recall this statement, "Last week the government learned about these crimes for the first time"?

A Did I focus on the statement, no. I don't remember that I did.

Q Do you recall reading the statement which begins

with an emphasis, "I stress that none of this activity was or could have been known to the government then?"

A Professor, perhaps I can answer simply by saying that some time after the letter was sent I was shown the letter and I read it. I read it completely.

Q At the time you read this letter you were aware that Mr. Sagor had come into possession of the Goe memorandum more than a week prior to the date of this letter?

A I don't know when Mr. Sagor came into possession of the Goe memorandum.

Q Do you recall when Mr. Sagor first told you about the Goe memorandum?

A No. I think I explained to you --

THE COURT: I now direct that you no longer direct any questions to the Goe memorandum or the Goe situation. That's my ruling and I will take responsibility for it.

Q You referred in your testimony before to an argument that we, the two of us, participated in in front of the United States Court of Appeals.

A That's correct.

Q Do you recall that argument?

A I recall that it occurred.

Q Do you recall what the argument was basically

over?

MR. GLEKEL: Objection. What relevance could this have --

THE COURT: I don't know where it is going, but this is the fourth time that we have been to the Court of Appeals in connection with the mandamus proceeding.

MR. DERSHOWITZ: He was counsel of record.

Q Do you recall what the nature of the mandamus proceeding was in the Court of Appeals?

A Yes.

Q Could you indicate that, very briefly?

A Yes. You wanted the Court of Appeals to order Judge Bauman to give you a letter that the government had given to Judge Bauman so that you could incorporate its substance in your responsive papers -- in your papers responsive to the supplemental memorandum of the Solicitor General in the Supreme Court.

Q You were aware, therefore, that it was our position that we had the right to the information in the possession of the government so that we could make an adversary presentation to the Supreme Court?

A Yes.

Q Were you aware of questions put to me by the judges, particularly Judge Weinfeld, that day?

A I was present in the court and listening. I don't know if I remember the questions.

Q Do you recall questions put to me by Judge Weinfeld regarding what it was that we were alleging, whether we were alleging pretrial suppression or merely more information relating to perjury?

A Not specifically, no.

Q Do you recall the questions that were put to me by Judge Weinfeld?

A Not specifically, no, but it is all tape-recorded, Professor.

Q Have you ever heard the tape recording?

A No. Whatever he said should be on the tape.

Q You indicated previously in your testimony that this particular United States Attorney's Office was having some problems with 3500 material in a series of cases; is that true?

A Yes.

MR. GLEKEL: Objection. What possible relevance could other cases have to this one?

THE COURT: He has answered that one. Let's see where it goes.

Q Is it part of the problem that the officehas on occasion not produced information which it was required

to under Rule 3500, and has been rebuked by the United States Court of Appeals for that?

MR. GLEKEL: Objection, your Honor.

THE COURT: Sustained.

Q In your discussions with Mr. Frey, did you tell Mr. Frey, in words or substance, that the information given to you, given to the United States Attorney's office in this district, about new crimes was not in the possession of the United States Attorney's office at the time of the trial?

A You mean the so-called "recantation"?

Q Yes.

A Most assuredly I did.

Q You further stated to him that the new information relating to Mr. Leuci's quorums was not in the possession of the United States Attorney's office at the time of the trial?

A Yes.

Q At the time you made that statement --

MR. DERSHOWITZ: I'm sorry, your Honor, but I don't know the extent of your ruling. I would like to ask him --

THE COURT: No more questions about the Coe situation neither directly or indirectly. That's the extent of my ruling.

MR. DERSHOWITZ: We would like to make an offer of proof that if asked the witness would state it was in his mind, that the Goe memorandum was in his mind, at the time that he made that representation to the Solicitor General's office.

THE COURT: On what basis do you make such an offer of proof? What reason do you have to believe that he is going to say that?

MR. DERSHOWITZ: The reason is simply that he knew about that fact and if your Honor prevents me from asking him --

THE COURT: Don't argue with me about it. Answer my question.

Have you talked to him and have you ascertained that that's what his answer is going to be? Have you?

MR. DERSHOWITZ: I have spoken to Mr. Gordan often.

THE COURT: Have you determined that that'swhat his answer is going to be?

I am going to let him answer it.

Had you determined what his answer was going to be when you made that offer of proof?

MR. DERSHOWITZ: It seems to me an offer of proof is appropriately made when there is a basis for making

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it. When the Court has refused to allow --

THE COURT: But it must be truthful and honest and based on fact.

MR. DERSHOWITZ: Are you suggesting I can ask a question only when I know without a doubt what the answer can be?

THE COURT: You can only make an offer of proof when you have reason to believe thatwhich will be contained in the offer; that is what I mean to indicate to you. That is the way it is.

Ask the question and we will see about these offers of proof you are making, and I hope the Court of Appeals will consider your offers of proof in the light of the answer to this question.

Go ahead.

Read the offer of proof to the witness.

MR. DERSHOWITZ: Excuse me, your Honor, but --

THE COURT: I don't want to hear any more about it.

Read the offer of proof to the witness.

THE WITNESS: I have no recollection -- and I have thought about it very hard since I learned I was going to testify here -- of ever thinking about the Goe memorandum in connection with my communications with the Solicitor

General with regard to Leuci's recantations. I cannot say positively that I remember everything I thought about 90 days ago, but I have no recollection of ever having considered the Goe memorandum in connection with my conversations with Mr. Frey.

THE COURT: Go on to something else.

MR. DERSHOWITZ: I must pursue this line one more step, your Honor.

BY MR. DERSHOWITZ:

Q So it is possible in light of the state of your recollection at this moment in time that you may have had it in mind at the time when you had communication with the Solicitor General's people?

MR. GLEKEL: Objection. Anything at all is possible.

THE COURT: Of course. Sustained.

MR. DERSHOWITZ: At this point wewould like to ask the Court for an opportunity to confer in chambers for a brief moment.

THE COURT: No. Put to me whatever youwant to put.

MR. DERSHOWITZ: With the greatest of reluctance, we wouuld move your Honor's disqualification from any further participatior in this case.

THE COURT: I heard your motion. Denied.

MR. DERSHOWITZ: On two grounds --

THE COURT: I don't want to hear them. Denied. Go ahead.

MR. DERSHOWITZ: May we have a moment, please, your Honor?

THE COURT: Yes.

(Pause.)

BY MR. DERSHOWITZ:

Q You are not, as you sit here today, prepared to deny under oath that it may have been in your mind at the time you had communications with the Solicitor General's office that there existed the Goe memorandum and its substance?

MR. GLEKEL: Objection.

THE COURT: Sustained. I just ruled on that.

MR. DERSHOWITZ: We have no further questions for this witness.

THE COURT: Does the government have any?

MR. GLEKEL: Just a few, your Honor.

CROSSS EXAMINATION

BY MR. GLEKEL:

Q Mr. Gordan, did you ever consider yourself or discuss with anyone the question of when the Goe memorandum

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was to be disclosed to the defendant?

A Well, when I had my conversation with Mr. Sagor about its existence and so forth, I inferred from what Mr. Sagor said -- I don't think we discussed it directly, but I inferred from what he said that he was going to turn it over at the time of the hearing on the pending new trial motion. But I never discussed with anyone beyond what I have just told you when it should be turned over, no.

Q Did you ever discuss with anyone the question of whether the Solicitor General should be informed of the existence of the Goe memorandum?

MR. DERSHOWITZ: It seems to me an objection is in order. If we are not allowed to pursue the Goe memorandum, I don't see why the government should be permitted to do so.

THE COURT: Yes. I don't want to hear any more about that.

BY MR. GLEKEL:

Q Directing your attention to your conversations with Mr. Frey of the Solicitor General's office on April 30th of 1974, I believe you testified that during one of these conversations the last of the day you suggested that this office, the United States Attorney's office of the Southern District of New York, would prefer that the

contents of Detective Leuci's new revelations would not be made public. Was it your understanding that the Solicitor General would make the final decision as to what the Supreme Court was to be informed of?

A Yes.

Q I believe you also testified that a time came when you read a teletype version of the government's supplemental brief to the Supreme Court?

A Yes.

Q How long a time did you have to examine that brief?

A The teletype began coming through, as I remember it, shortly after 10 o'clock at night, and it finished coming through 20 minutes to 11 at night. It was printed in duplicate, an original and a carbon. I put the carbon Mr. Sagor's desk and went home with the original, read it, brought it in the next day, and after various consultations I was back on the phone to Mr. Frey at about 9.30 or a quarter to 10 the following morning.

Q Directing your attention to June of this year, did you ever learn that Mr. Dershowitz sought a delay in the Supreme Court consideration of its petition for certiorari until after the District Court heard the new trial motion?

MR. DERSHOWITZ: Objection. "Delay" is a

characterization.

A Yes. Mr. Frey called me and told me -- I don't recall if it was June, but it was at the end of all of these events; he called me and told me that Mr. Dershowitz wanted an adjournment of his response to the Solicitor's supplemental memorandum, and he asked us what our position -- I'm sorry -- until after the hearing on the new trial motion, and he asked me what our office's position was on his consenting to such a thing.

Q What was your response?

A Ultimately or immediately?

Q Ultimately.

A Ultimatelywe told Mr. Frey that it was up to him what he did.

Q That you took no position?

A We left it up to him. We did, in fact, take no position.

MR. GLEKEL: May I have a moment, your Honor?

THE COURT: Yes.

(Pause.)

MR. GLEKEL: No further questions, your Honor.

REDIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q What was your immediate response to Mr. Frey's

indication to you that a request had been made to put off the Supreme Court consideration?

A I remember saying I would have to talk it over. I don't know whether I immediately told Mr. Frey what I thought or not. At some point I thought -- I think I told him what our collective thinking was but whether I told him what my own thinking was originally I don't know.

Q Could youtell us what you told him about your collective thinking?

A As I remember it, I told him that we were rather annoyed at you because we had understood, or I had understood, and I think it was generally agreed, that when you appeared before Judge Bauman asking for the letter -- well, asking for revelation of what Leuci had said and debriefing of him, and then Judge Bauman said we must write a letter, and then Judge Bauman at a subsequent hearing said he was notgoing to turn over the letter, and then we went to the Court of Appeals, you had said both to Judge Bauman and the Court of Appeals, as I remember, that you had to have this done right away because you wanted to get the information and put it in your papers, which you wanted to file by Thursday of that week, and you very anxious to have the matter disposed of that term. Then Mr. Frey calls up and says that you want an adjournment which will clearly take

it out of that term into the next term, and so, frankly, we were of the view that you said one thing here and another thing to Mr. Frey.

Q Were you aware who made the first request for a delay in the Supreme Court, whether it was the Solicitor General's office or Mr. Rosner's counsel?

A When?

Q In this case.

A I have been told that the Solicitor's responsive memorandum in opposition to your cert. petition was delayed at his request, I believe, for a significant period of time.

Q Are you aware that on May 7th, I think, the Solicitor General wrote a letter to the Supreme Court asking them to take the case off the list and to defer consideration?

A Yes.

Q Are you aware now as you sit here whether the Supreme Court, in fact, delayed the consideration of the matter or acted on cert. during this term?

A Am I aware as to whether they delayed it or acted on it? They did both.

Q My question is: Do you know whether they delayed it beyond the end of the term?

A No, they did not.

I have not, Professor, finished my answer to your initial question of what I told Mr. Frey.

Q I'm sorry.

A I told him that.

I told him that it seemed quite clear to us that you were anxious to have the Supreme Court decide our motion rather than decide the Mesarosh point, as you called it, rather than the District Court, and we did not understand why after pressing so hard for the Supreme Court to decide it you suddenly were going to be put in a position where the District Court was going to decide it. Quite frankly, I said to Mr. Frey we thought you were up to no good but we didn't know what it was. As far as we were concerned, we wanted the thing disposed of in the District Court and it was up to him what he did because we didn't know what you were doing.

Q When you received the Teletype copy of the Supreme Court's response, did you, in fact, make any changes in it?

A Yes. I'm sorry. You mean of the Solicitor's response?

A Yes.

Q May I show you Government's Exhibit D.

A Yes.

Q Look at the handwriting inserts.

MR. SAGOR: There no government exhibit marked D. Is that a defendant's exhibit?

THE WITNESS: This is Exhibit G. It is Defendant's Exhibit G.

MR. SAGOR: Is that for identification?

MR. DERSHOWITZ: Yes.

THE WITNESS: Can I tell you whose handwriting this is?

Q The inserts, yes.

A I cannot. It is not mine.

Q Is this the Teletype you received?

MR. SAGOR: Objection, your Honor. Obviously it cannot be a Teletype.

MR. DERSHOWITZ: I don't know.

A This is not a Teletype.

Q Do you have a copy of the Teletype you received with your own handwritten inserts?

A No.

Q Do you know where a copy of that would exist?

A My recollection is that I sent the copy that I had long after all this was over and I was cleaning up to get out of the country on business, I sent all the residue of papers including that to Mr. Sagor.

MR. DERSHOWITZ: May I ask the government to

produce that?

MR. SAGOR: We have the Teletype. I think it has my handwriting and also Mr. Gordan's handwriting. I have no objection.

May this be marked?

(Government's Exhibit 20 marked for identification.)

Q Can you tell us generally what changes you made of substance? Let me ask -- let me withdraw that and ask you in a different way.

There is a change in the teletype addition which reads as follows -- the original read:

"It should be made only after hearing such new evidence as is available, including evidence on petitioner's allegation, which the United States Attorney denies, and which is potentially critical to the disposition of the new trial motion, that there was knowledge on the part of or wrongdoing by the prosecution in connection with false testimony by Leuci."

Added in on the side in handwriting are the following words, after "petitioner's allegation," "that the Government knew about Leuci's additional criminal conduct."

Can you tell us whether that was an addition that you suggested or an addition that somebody else suggested?

A That is not an addition that I suggested. The Government's -- I'm sorry, does this have a number? Yes. Exhibit 20 is not my copy of the teletype.

As I told you, it came in duplicate and I put one on Mr. Sagor's desk and I kept one, and the next

morning, Mr. Sagor and I got together and we conformed my copy, and I dictated my suggested changes to a secretary to a man named Kitch in the Solicitor General's office.

Q Edmund Kitch?

A But this is not my copy and whether this suggested change went into the final one, I have no idea.

MR. DERSHOWITZ: Can we ask the Government for a copy?

MR. SAGOR: To the best of my knowledge, I don't have Mr. Gordan's copy.

THE COURT: Look for it during the luncheon recess.

MR. DERSHOWITZ: Could you also, if your Honor please, have Mr. Gordan look for his written memorandum that he just referred to incorporating the changes that he suggested to the Government?

THE WITNESS: No, no, no.

THE COURT: He said he made it on one of the two copies of the teletype.

Did you not?

THE WITNESS: Yes, sir, and I sent my copy, as I remember -- it's possible I threw it away -- but I think I sent all that stuff down to Mr. Sagor, but I never made a memorandum, I just inked it on the teletype.

MR. SAGOR: I will look for it over the lunch hour. I think one one copy of the Telex was saved and that's apparently my copy.

THE COURT: Just look for it over the lunch hour.

MR. SAGOR: Yes, sir.

MR. DERSHOWITZ: Your Honor, we have no further questions of this witness at this time.

THE COURT: Do you have any?

MR. GLECKEL: Nothing further, your Honor.

MR. DERSHOWITZ: In light of material that's been turned over to us and in light of testimony elicited from the witness, we would like to call Mr. Sagor to the witness stand.

THE COURT: All right.

THE CLERK: Mr. Sagor, you are still under oath. Do you understand that, sir?

MR. SAGOR: Yes, sir.

E L L I O T G. S A G O R, resumed.

FURTHER DIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q Mr. Sagor, referring your attention to this document, can you tell us whether or not this is your handwriting?

A Yes, some of the handwriting apparently is mine.

Q Directing your attention specifically to the words "that the Government knew about Leuci's additional criminal conduct," is that your handwriting?

MR. DERSHOWITZ: Excuse me, your Honor. I just noticed that the previous witness is sitting in the courtroom, and I think perhaps it would be better --

THE COURT: Do you want him excluded?

MR. DERSHOWITZ: Yes.

MR. GORDAN: I'm sorry, your Honor.

MR. DERSHOWITZ: I'm sorry, too. We may have to recall you later.

A Yes.

Q Are there erasure markings over the pencil written words?

MR. JAFFEE: Judge, I have an objection. I'd like to know where this is going.

THE COURT: I don't want to hear any more offers of proof.

You may answer.

A Maybe. It's in a fold. It's perhaps -- very dulled looking --

Q Sir?

A It may perhaps be dulled by the fold in the paper.

Q Looking specifically about an inch above the fold

to the words at the top, "that the Government knew about," as you sit here now, do they look to you now erasure marks?

THE COURT: Here's a light.

MR. DERSHOWITZ: We'd like to admit that entire document in evidence, may it please the Court.

THE COURT: One thing at a time.

A The answer may be still maybe, I am not sure.

Q As you sit here today, do you recall ever making an attempt or beginning an attempt to erase any of these words?

A Any of my handwritten words?

Q Yes.

A I have no specific recollection. I know that Mr. Gordan left me a message one day to look at the teletype and I know I started to make some marginal notes on it, but it by no means represented a complete reworking of the telegram. I may in fact have erased; I may not. I don't remember.

Q If you in fact erased, would you know when you did that?

MR. JAFFEE: Objection.

THE COURT: Sustained.

Q Do you recall any specific time when you made an

attempt to erase any words that you wrote?

MR. JAFFEE: Same objection.

THE COURT: He is asking him.

Do you remember erasing anything in the first place?

THE WITNESS: Your Honor, it could be. I don't remember one way or the other.

THE COURT: Do you have any recollection of when such an erasure was made?

THE WITNESS: If such an erasure was made, if it was, the answer would be at or about the time that the -- prior to the Solicitor's gray brief, the supplemental memorandum; it would be some time before that, probably.

Q Do you recall approximately how many requests for information you received from me directly, or from other attorneys acting on Mr. Rosner's behalf since the time I came into the case?

MR. JAFFEE: Your Honor, I am going to object to any information that goes into anything brought out from Mr. Gordan. There was adequate time to examine Mr. Sagor in the last few weeks. It wasn't done.

I think counsel should be precluded from going any further.

THE COURT: I will permit it within reasonable

limitation.

A Those requests, Mr. Dershowitz, to the best of my knowledge, are spelled out in the Government's affidavit of April 9, 1974.

Q Would it be fair to characterize it as having received numerous requests from me asking about any information you may have relating to crimes committed by Leuci and not admitted at the trial?

MR. JAFFEE: Objection.

THE COURT: The thing speaks for itself. It's a document and it's there.

Sustained.

MR. DERSHOWITZ: Your Honor, I feel constrained by your ruling previously, so I will not pursue -- oh, I will pursue only one further minute or question.

Q Did you ever tell Mr. Gordan that I had made an argument before this court in the Nadjari matter in which I stated that the Supreme Court -- that the Solicitor General had deliberately made certain misstatements to the United States Supreme Court?

A No.

Q Did you tell him in fact that my statements --

A I'm sorry, Mr. Dershowitz. Would you repeat that question?

Q Did you ever tell Mr. Gordan that I had characterized --

A Excuse me.

THE WITNESS: Can I have the court reporter read it back?

(Record read.)

A No. I may have mentioned, of course, that you made statements in the Nadjari case which was on the record, but with respect to the statement that the Solicitor General --

THE COURT: No recollection, Mr. Dershowitz, of that.

Q Did you inform him in fact I said the United States have, through its Solicitor General, who presumably was unaware of these disclosures, made a representation to the United States Supreme Court directly contrary to that?

A Mr. Dershowitz, I don't understand the question.

Q Were you aware that not only did I not charge the Solicitor General's office with deliberate misconduct, I specifically said that it was probably -- they were probably unaware of it?

MR. JAFFEE: Objection. If Mr. Dershowitz wants to testify --

THE COURT: I think the record is clear.

Sustained.

Q As you sit here today, do you have any knowledge about how Mr. Gordan learned that I had stated in court that the Solicitor General had deliberately withheld information from the Supreme Court?

A No, but I have a surmise what may be the basis for what he said.

Q Do you recall in my statement before Judge Bauman in the Nadjari matter that --

A Excuse me, Mr. Dershowitz. I was not present in the Nadjari matter. I have at times, I think, looked at the transcript of those proceedings, but I understand there may have been proceedings where you spoke to Mr. Giuliani off the records. There are some things I am not familiar with.

Q Have you read the transcript of the record on the record in which I made a certain presentation before the Honorable Judge Bauman about our interest in getting information relating to the Leuci matter for purposes of presenting it to the Supreme Court?

MR. JAFFEE: Objection.

THE COURT: Overruled.

A Yes. I think I testified to that the last time. I may be mistaken.

MR. JAFFE: Objection.

Q -- that the Supreme Court was likely to dispose of this case on certiorari within the next week or so?

MR. JAFFE: Objection.

THE COURT: Sustained.

Q At the time that you participated in the decision to ask the Supreme Court not to make the Rosner recantations known -- not to have the Solicitor General make the Rosner recantations known to the Supreme Court, did you have in mind that the Supreme Court was scheduled to act on the petititon for certiorari within a very short period of time?

MR. JAFFE: I object to the form of that question.

THE COURT: It's objectionable. I'm just trying to save some time.

Overruled.

A I never participated in any such decision, Mr. Dershowitz, nor do I think there was any -- nor do I understand that there is any such decision.

As I understand it, appropriate information was given to the Solicitor General. It was understood that he would do the appropriate thing, given the wishes of the United States, which would be considered for what they were

worth, and only for what they were worth, but it was his ultimate decision to take the appropriate action with respect to the Court which was something the United States Attorney always understood.

Q Did there ever come a time when it came to your attention that the position of this particular United States Attorney's office was that that material should not be brought to the attention of the United States Supreme Court?

A That has never come to my attention. Even as I sit here now.

I take it what Mr. Gordan said was the Government's preference at the time was not to make it public.

Q You were aware of that preference?

A Was I aware of that preference? I was not, as I best remember, privy to the initial conversations on the 30th that Mr. Gordan had with Mr. Frey. I don't think I was there.

Q Was the substance of those conversations related to it?

A At some time, yes. But I mean, it's possible that it was only in connection with your examination of me thereafter. I think that I had occasion to look more specifically at what Mr. Gordan told Mr. Frey on the 30th.

MR. DERSHOWITZ: Your Honor, for the record, there were several questions that we wanted to ask Mr. Sagor about the memorandum.

THE COURT: Yes, I understand.

MR. DERSHOWITZ: Which we will not be able to ask him.

In light of that, we have no further questions of this witness.

MR. JAFFE: Your Honor, may I have just a second to consult with Mr. Sagor?

THE COURT: Yes.

(The witness steps down from the stand.)

MR. DERSHOWITZ: Your Honor, is this usual, to consult with the witness?

THE COURT: It's not usual, but I don't see any objection to it.

MR. SAGOR: I could ask myself questions, but I can't do that. That's the problem, Mr. Dershowitz.

THE COURT: That always seems to me a rather silly procedure, and I don't permit it.

You, of course, can simply go on and ask what transpired in this conversation.

MR. JAFFE: Mr. Clerk, would you mark this Government's Exhibit 21, please.

(Government's Exhibit No. 21 was marked for identification.)

CROSS-EXAMINATION

BY MR. JAFFE:

Q Mr. Sagor, directing your attention to Exhibit 20 for identification, which is the Telex, and Exhibit 21 for identification, which, for the record, is a gray copy of the supplemental memorandum for the United States -- Supreme Court of the United States, the matter of Edmund Rosner v. the United States, have you taken the time to compare the changes you say were made in your handwriting to see whether they hav e been incorporated into the final brief?

A No, I am not familiar with all the changes that were made and whether my suggestions were actuallyincorporated in the final copy. I know some were.

MR. JAFFE: Nothing further.

THE COURT: Mr. Dershowitz?

MR. DERSHOWITZ: Nothing further, your Honor.

THE COURT: Step down.

Put Mr. Leuci on the stand, please.

(Witness excused.)

MR. JAFFE: I would like to state for the record that the Government this morning furnished a further

redacted copy, which has been marked Exhibit 8-A for identification, to Mr. Rosner. Your Honor will recall that Exhibit 8 for identification was not furnished to Mr. Rosner but only to Mr. Rosner's counsel.

Exhibit 8-A, which was a further redaction, has been turned over to Mr. Rosner. That exhibit, as well as the other exhibits, comes under the protective order previously signed, and we would like the Court to caution both counsel and the defendant not to make any extra-judicial statements concerning any of the matters that are covered in that memorandum, as the order of your Honor, previously signed, provided.

THE COURT: I am sure it is not necessary in the case of Professor Dershowitz. I so order it in the case of Mr. Rosner.

MR. SAGOR: Just one brief matter before Mr. Leuci takes the stand.

Subsequent to the hearing in this case, I had occasion to be contacted by the defense counsel in the case of People v. Walls, who tells me that he is making a claim in the District Attorney's office that Detective Leuci and Richard Lawrence may have lied in the Junco case insofar as Leuci testifying about the Baron being a reliable informant, and perhaps other statements.

I bring it to the Court's attention since Mr. Dershowitz mentioned on this same case in Leuci's same testimony, arguably, Detective Leuci, in failing to bring out the misconduct that he has acknowledged with the Baron may have made a misstatement in this case. I havenot seen all the record. I just amplify the record in that regard.

THE COURT: All right.

THE CLERK: Mr. Leuci, you are still under oath. Do you understand that?

THE WITNESS: Yes.

R O B E R T S. L E U C I, resumed.

DIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q Good afternoon, Mr. Leuci.

A Good afternoon.

THE COURT: Professor, do you have any idea how long you are going to be with Mr. Leuci? I am thinking in terms of the luncheon recess.

MR. DERSHOWITZ: We will try to be as quick as we can, but we probably will need an hour.

THE COURT: Well, let's sit until 1:00 o'clock and then we will come back at 2:15.

All right.

Q Do you recall testifying here --

THE COURT: Will there be any other witnesses by either side today? I take it this will conclude the testimony on the hearing; is that correct?

MR. DERSHOWITZ: Well, your Honor did mention in passing from the bench the possibility that I would be asked to testify.

THE COURT: No, no, no. I don't suggest that. You will decide whether you want to testify.

MR. DERSHOWITZ: I have no intention of testifying, your Honor.

THE COURT: It may be that the Government would invite it, but it's up to you to decline.

Q Mr. Leuci, do you recall testifying --

THE COURT: Are you going to call Professor Dershowitz?

MR. SAGOR: I just asked Mr. Jaffe that same question. I doubt it. I assume he would not vouch for him if he called him.

THE COURT: Go ahead.

Q Do you recall testifying here about ten days ago that you gave to Richard Lawrence narcotics on one occasion, and that you had been present when narcotics were given to Mr. Lawrence over your objection on one other occasion?

MR. SAGOR: Your Honor, for the help of counsel, could we have a page number?

MR. DERSHOWITZ: Page 111.

Q Do you recall that?

A Yes.

Q Do you recall also testifying that the only situation in which you gave narcotics to the Baron was when you put some narcotics in his car after an arrest which you considered was very important to keep the Baron moisted?

A Yes.

Q And do you recall also testifying on Page 224 that the only time you gave drugs to anyone else other than these addicts was in the one situation where you gave some narcotics to the Baron after that case, and there was another time when you gave a pound of marijuana to another guy, but other than that I have never given any quantity of drugs to anybody?

A Yes, I remember saying that; yes.

Q Do you recall testifying that you always objected to anybody giving drugs to the Baron?

A Yes.

Q Do you recall having told Mr. Jaffe prior to your testimony here that you had in fact suggested the procedure to Richard Lawrence whereby he would get delivery of drugs

obtained in arrests?

MR. JAFFE: I object. That's a mischaracterization of what the memo says.

THE COURT: Mr. Dershowitz appears to be reading from something.

What are you reading from?

MR. DERSHOWITZ: I am reading from the Jaffe memorandum. I am not reading; I am paraphrasing.

MR. JAFFE: Having had a prior experience, I would prefer it to be read.

Q Do you recall a following statement of Mr. Jaffe -- I don't know whether he made that statement to Mr. Jaffe or this is a characterization of it --

A That's the problem with the memorandum.

THE COURT: If you want to ask him something which he is alleged to have said, read to him what he is alleged to have said.

Q Did you tell Mr. Jaffe, in words or substance: Lawrence would have gotten delivery of, for example, an ounce the prior day to the arrest and since the source was arrested Lawrence would not pay for whatever drugs had been previously delivered. Leuci indicated that in fact Lawrence told Leuci this was going on. At one point Leuci suggested this procedure to Lawrence -- that is not

the end of the sentence, but I am ending my paraphrasing.

A Over a period of time Lawrence had been after me to give him drugs, but the fact that I knew or I assumed, I felt that I knew, that the way he was working it was that, the way you described, we would work on a case and an individual, he would order narcotics from the individual. The day prior to the day that we would effect the arrest, Lawrence would order a sample, the sample would be delivered to him, he would take that sample. When the guy came the following day, delivered the remainder of the package, he would arrest the guy. Lawrence never paid for the sample that had been delivered the day before.

I knew he had been doing that for a long period of time. He would say sometimes he said he did, and sometimes he said he didn't do it. At one point in time, when Lawrence -- I had a conversation with Lawrence and he was constantly telling me that he was in need of money, and he was in need of money this particular time. He was telling me he was in dire need of money. I told him the best thing to do, go out and make a case, do it the same way he had been doing it in the past. "Go ahead, order a package," the same way he had been doing it, and there is a tape recording of that meeting, and he describes, now, I described to what I believed that he was doing, and he said

he never did that, but I never arranged for the Baron to get a package delivered prior to the time I arrested somebody, if you can follow what I am talking about, Professor. I mean, he would handle the whole thing in his own wormy, little way, you know. He would set the guy up, order a package, now pay for it, and then order another package. The guy would be arrested and he would never pay for the package.

Q Did you mention that there was a tape recording of this discussion between you and Richard Lawrence?

A Yes.

Q Do you know where that tape recording is at the present moment?

A No.

Q Have you recently heard that tape recording?

A Not recently, no.

Q When did you last hear it?

A I don't know. Seven or eigh eeks ago. It's a recording I made with Lawrence.

Q And is that currently, to your knowledge, in the possession of the United States Attorney's Office?

A To my knowledge it is. I would think it is.

MR. DERSHOWITZ: We ask the Government to produce it.

MR. SAGOR: Absolutely not. We are waiting for Lawrence to take the stand. We are waiting to play him some of his prior inconsistent statements to show him how perjurious his prior statements are.

I take it this hearing is truly closed as to Lawrence.

MR. DERSHOWITZ: This is as to the truthfulness of Mr. Leuci's statement which he says is on tape.

MR. SAGOR: I believe his --

MR. DERSHOWITZ: He is not the --

THE COURT: Please, Mr. Dershowitz, that is not the way things are done here.

What he has done is just described a conversation which has been taped, and your opponent wants to hear it. Why isn't that in the interests of finding out what the facts are and what the truth is? That's what we are all here to do. We are not here to play games.

Play it for him at the end of today's session, please.

MR. SAGOR: Do we take it, your Honor, we have a representation from Mr. Dershowitz that he is not calling Richard Lawrence? I have a feeling that he may be getting all this material, and then suddenly decide that in view of some new footnote to the case that he has a right to

call Lawrence. Lawrence may well be testifying before a grand jury some day.

THE COURT: Just a moment, please. This witness has testified to a conversation he had with Lawrence. There is a tape recording of that which is obviously the best evidence of the conversation. I don't really care whether he puts on Lawrence or not.

He said two or three times now that he probably was not going to put Lawrence on. Indeed, about ten minutes ago, I asked if this was the last witness, and with the possible exception of Professor Dershowitz, I was told it was.

Now, I am not interested in what the foot work is here. I want to find out what the facts are and it's in the interest to find out what the facts are to have this tape produced. That is the order of the Court.

MR. SAGOR: We will certainly comply with the order of the Court. My expectation is that Mr. Dershowitz, upon hearing the tape, will then have another hearing for another day.

THE COURT: We will do that tomorrow morning.

MR. DERSHOWITZ: May we ask your Honor if we can possibly hear this tape during the lunch recess to avoid that problem?

THE COURT: I don't know how long that is. Is that possible?

MR. SAGOR: Your Honor, I will even have lunch with Professor Dershowitz at the order of the Court.

THE COURT: Don't make undue sacrifices now. Go ahead.

MR. DERSHOWITZ: I think, in the interests of expediency, I will defer further questions on this point until I hear the tape, because it would be redundant.

Your Honor, at this point I would like to ask Mr. Leuci one small matter, and I think your Honor will see why it's critically important to our case that I ask it.

Q Mr. Leuci, you told Mr. Jaffe, as I understand it, that there were numerous occasions on which you kept money that you had obtained in the course of arrests; is that correct?

A Yes.

Q Now, can you estimate how many occasions that was that you told Mr. Jaffe about that?

MR. SAGOR: Objection, your Honor. We have been through this time after time.

MR. DERSHOWITZ: It's only a foundation.

THE COURT: I will permit it. He says it's

crucially important. I will permit it.

A I would say anywhere between fifteen and eighteen times.

Q Now, at one point on Page 71 of the Jaffe memorandum --

MR. SAGOR: Is this Government's Exhibit 8 for identification, Mr. Dershowitz?

MR. DERSHOWITZ: I think so. That's the exhibit on the Jaffe memorandum.

MR. JAFFE: We hand over documents. They get marked as exhibits, and that's how they are used.

T COURT: The record must indicate that.

Q On Paragraph 17, you indicated that -- Leuci indicated that on the arrest of the "blank" case while executing a search warrant, money was found by FBN agent "blank." Leuci and FBN agents "blank" shared $100 each. This was Leuci's first score.

Do you recall that?

A Yes.

Q And there were, as you say, numerous other scores much like this?

A Yes.

MR. DERSHOWITZ: Here is the question I would like to put in, with all due respect:

Q Can you please tell us the names of the agents with whom you shared the $200 that was related to in the so-called Goe memorandum?

MR. SAGOR: Objection, your Honor. What does this have to do with the Goe memorandum?

THE COURT: I don't know where it's going, but I will let him answer it.

MR. SAGOR: Your Honor, with respect to the Goe memorandum, he could comment on this another way. I would like to have an offer of proof from Mr. Dershowitz.

THE COURT: Yes, you are right. Just a moment, please.

It seems to me that I have forbidden all the names to be presented upon the public record previously, and I adhere to that ruling. I adhere to that ruling.

MR. DERSHOWITZ: Let me state for the record, then, in the light of the way your Honor described the proprieties of making an offer of proof, since I don't know the answer to this question, I will not put it in terms of an offer of proof. But let me tell you what I would like to elicit from this witness.

THE COURT: That's fair enough.

MR. DERSHOWITZ: I would like to find out from this witness whether or not any of the agents who were

involved in the Goe memorandum episode were the same agents, or agents from the same unit as other agents who shared in other so-called scores with Detective Leuci.

THE COURT: What difference would it make if they came from the same unit?

MR. DERSHOWITZ: The reason for that is this, your Honor: I think it's very clear, as a matter of law, that had the Goe memorandum been turned over to the Government as 3500 material at trial -- to the defense -- it could not as a matter of law have been redacted. It would have had to contain all the names of the agents. It would have then been the job of the defense attorneys, which they surely would have done in light of their great interest in pursuing all of Leuci's criminality to contact and interview each of those witnesses to find out whether they had engaged in other acts of misconduct with Lueci, and so it's very possible, and indeed probable, that the disclosure of the Goe memorandum would have been the opening wedge to the disclosure of eighteen or twenty other so-called scores.

THE COURT: I understand your proposal. The objection is sustained.

MR. DERSHOWITZ: A further statement along those lines is that interviews might also have revealed that the names, if we had interviewed the agents whose names were

given by Leuci --

THE COURT: I think the record is clear. What you are saying is if you knew the names you would have had additional leads to follow up, and you might have found out more about Mr. Leuci's practices.

MR. DERSHOWITZ: One minor point: If, in fact, the leads had been borne out, and we would have found them true, we might very well have had additional crimes against Mr. Leuci to establish additional crimes; if,on the other hand, the agents denied participating in the Goe incidents or other incidents, we might have been able to establish at trial that Lueci would have made false accusations which would have been directly to the guilt or innocence of Mr. Rosner.

THE COURT: It's highly hypothetical and supposition.

Sustained.

Q Do you recall denying on a week ago Monday at the hearing here --

MR. JAFFE: May we have the page here?

MR. DERSHOWITZ: Page 111, again, of the transcript.

Q -- that you were involved in a narcotics conspiracy with Lawrence and others, including certain people in Brooklyn?

A I recall denying that I was ever involved in any kind of conspiracy with Lawrence. I recall saying I was never involved in any kind of conspiracy with Lawrence people from Brooklyn, Mars, or anyplace else, so I assume the question is -- no, or yes.

Yes, I recall saying it.

Q Do you recall the following statement that appears on Page 35 in the Jaffe memorandum --

MR. JAFFE: Your Honor, before that goes on, let me make one thing very clear, since I prepared the memorandum. That memorandum does not purport to be any statements made by this witness. Those are my impressions in putting together of a lot of different things of what the man may or may not have indicated or may have been indicated about him. Nothing contained in there, unless it's quoted, is a statement of this witness.

I want that to be clear on the record.

MR. DERSHOWITZ: That's precisely why we prefer not to read from the document, why we prefer to question him on the basis of paraphrases of the document.

THE COURT: We have been all over this in another matter, and where the manner in which that is done is by way of suggesting to him impliedly that you are in fact reading something he has said. First of all, that is

contrary to the rules which govern the trial of cases in that if you are purporting to quote, I think your adversary may see the thing from which you are purporting to quote, something I did not realize at the time of the case but I have learned since, so I am cautioning you not to indicate directly or indirectly that you are reading from something when you are not doing so.

MR. DERSHOWITZ: May I make it clear then that Mr. Leuci is not to take anything that I tell him as a direct quotation. He should assume that everything that I am telling him is a paraphrase.

THE COURT: From something that Mr. Jaffe wrote.

MR. DERSHOWITZ: I am paraphrasing what Mr. Jaffe wrote which purports to be statements made by Mr. Leuci to Mr. Jaffe.

THE COURT: He didn't say that. If you listened a few moments ago, he didn't say they were statements purportedly made by Mr. Leuci. What he said that is in that memorandum is a conglomeration of information which he has received from a whole variety of sources, and the only time he feels certain that it can be attributed to Mr. Leuci is when Mr. Leuci is quoted in that statement. Now, that's what he said.

MR. DERSHOWITZ: Do I understand that correctly

that this comes from a conglomeration of sources other than Mr. Leuci?

MR. JAFFE: That information comes from things that were said by Leuci and were said about fifty-nine other times by Leuci, and ways that Leuci indicated things. When there is a direct statement in here, it's a statement; if not, it's not a quote.

THE COURT: You are saying now, Mr. Jaffe, that what is in that thing was your --

MR. JAFFE: It's my perception of what Leuci was indicating.

THE COURT: Of what this man said?

MR. JAFFE: That's correct.

THE COURT: And the only time you direct words to be imputed to him, they are quoted?

MR. JAFFE: That's correct.

THE COURT: Other than that, it's like any other time when a prosecutor interviews a witness?

MR. JAFFE: That's correct. I don't want a rehash of something we had in another case with Professor Dershowitz, where we wind up with the witness being told, didn't you say XYZ to somebody, when that really didn't happen at all.

MR. DERSHOWITZ: Your Honor, may it pleaae the

Court, that really did happen on this --

MR. JAFFE: Excuse me.

MR. DERSHOWITZ: -- and that's mischaracterization.

MR. JAFFE: If this lawyer is going to question this witness on documentation in Government exhibits we provided, the Government requests he be required to say, "Did you indicate or say the following," and quote the language, because otherwise the witness is going to be misled into what he supposedly said to somebody and we don't want to see that happen again.

THE COURT: I am going to permit Professor Dershowitz to examine until I see where it goes. I am going to stop now until 2:15, or would you want to -- how long is this tape you want to listen to?

MR. SAGOR: I don't know. I think less than an hour. Maybe the witness could --

THE WITNESS: Not the one tape.

MR. SAGOR: Longer than an hour?

THE WITNESS: I would say it would take Mr. Dershowitz, if he really wants to go over it -- it's not an easy tape, it's a fairly difficult tape -- it's going to take him a few hours, a couple of hours.

THE COURT: You can do that after the Court day.

MR. DERSHOWITZ: Can we find out before the recess?

Q Are there further tapes that you know of in existence that you took in connection with this new trial motion that you have had an opportunity to listen to in preparing for your testimony?

THE COURT: Are you suggesting that he took that tape in connection with this new trial motion?

MR. DERSHOWITZ: Yes, that's what I understood.

THE COURT: Is that the fact?

THE WITNESS: No, I recorded this conversation during the investigation of Lawrence a couple of years ago.

MR. DERSHOWITZ: I'm sorry.

MR. SAGOR: I think March '71. Perhaps Mr. Dershowitz would desist from listening to it then. It's a March '71 tape.

MR. DERSHOWITZ: No. In fact, it becomes even more important. It can --

THE COURT: All right. The answer is "no." Let's stop it there.

MR. DERSHOWITZ: May we ask --

Q -- whether there are any other tapes?

A Of Lawrence?

Q Of Lawrence, that you made?

A Not that I made.

Q But there are other tapes made of Richard

Lawrence?

A I would assume.

Q That you heard --

MR. SAGOR: Your Honor --

THE COURT: Don't assume. Tell us, if you know.

A I don't know.

Q Have you heard or been told of other tapes made by Mr. Lawrence?

MR. SAGOR: Objection. We pointed out the other day we heard something from Frank Rogers' office, one tape.

THE COURT: Listen, Professor. I have directed the United States Attorney to turn over the tapes in his possession. It seems to me this has been the subject of testimony before, has it not, with relation to Rogers' office?

MR. SAGOR: Yes, the Rogers' tapes of the Baron.

THE COURT: I have authorized, and indeed I have directed the United States Attorney to turn over any tapes, or to permit you to listen to any tapes of conversations between Leuci and the Baron. And that is the order of the Court.

More than that I shall not do.

In that event, we will be here at 2:15, and you will continue this examination. You will listen to that

tape this afternoon, and if there is anything you want to interrogate this man about based on those tapes, we will meet tomorrow morning about 10:00 o'clock.

2:15, gentlemen.

(Luncheon recess.)

AFTERNOON SESSION

2.25 P.M.

THE COURT: Sorry to delay you but I had a show cause order that delayed me.

MR. SAGO: With respect to that tape recording that Detective Leuci spoke of, I gave Mr. Dershowitz a transcript, a non-finalized transcript. He indicated that that may well suffice. I have not heard from him thereafter.

MR. DERSHOWITZ: We are not in the process of reading the transcript. It is lengthy. We were told by Mr. Sagor that he could not vouch for its completeness and total accuracy. If I could avoid having to listen to the tape --

THE COURT: I am sure that is so. Look it over. I am anxious that the hearing proceed from day to day until the testimony is concluded. It is quite obvious that I am going to have to get an opinion out on this matter. I want the testimony concluded as early as possible.

MR. DERSHOWITZ: We would like to conclude it today, and I think we can, subject only to that.

ROBERT S. LEUCI, resumed.

REDIRECT EXAMINATION CONTINUED

BY MR. DERSHOWITZ:

Q Detective Leuci, you testified, did you not,

gp2 Leuci - redirect

repeatedly at this proceeding a week and a half agothat the largest illegal seizure of money that you made was $40,000; is that correct?

A That's true.

Q Did you not tell the government that the largest seizure may have been as much as $80,000?

A The initial debriefing -- you are talking about a specific incident. I was unsure of the amount of money. The $80,000 figure is half of a large sum of money that was seized by myself and ten other detectives and I was unsure of the amount of money that was there at the time. I remembered my exact share. It was $3500. I thought at the time it could have been anywhere between $40,000, $75,000, $80,000. I think probably at the initial debriefing when I spoke to Mr. Giuliani and Mr. Puccio, I may have said $80,000 up to $160,000. I was not sure. It happened quite some time ago. Thinking about it and talking about it some more I realized the amount ofmoney that I got, and I knew exactly how much it was. It was $4000, and then $500 from the $4000 was sent back, so I came up with the figure of $40,000. That's what I believe to be the correct figure.

Q Can you tell us whether you spoke to anybody who helped refresh your recollection and to reduce it from

possibly $160,000, or $80,000, down to $40,000, or is it just that you thought about it in your own mind?

A I thought about it in my own mind as far as how the shares were divided amongst the detectives that were there, and I remembered it to be a large sum of money. So is $80,000. But as far as myself, that was the largest amount of money that I had been around, and my share of that was $4000, subtracting $500 which I gave back.

Q As you sit here today, can you be absolutely certain that the amount was $40,000 rather than the $80,000 you initially told --

A It certainly was not $80,000. I was absolutely positive it was very little more than $40,000, if it was more than $40,000. I assume that $40,000 was the amount of money that was taken.

Q I want to clarify this. The only new information you had in your mind between the time you gave the figure between $80,000 and $160,000 and the figure of $40,000 was your calculation as to how many people were involved and what your share was?

A Yes.

THE COURT: Do I understand that the other nine people with whom you split this were law-enforcement people

like yourself?

THE WITNESS: They were all detectives assigned to the Narcotics Division and two supervisors.

THE COURT: In this particular array there were ten people involved with the enforcement of the narcotic laws who calmly, I believe the expression is, "ripped off" $40,000? Is that right?

THE WITNESS: That's true.

THE COURT: You may proceed.

BY MR. DERSHOWITZ:

Q Have you discussed this incident, this event, with anybody else with whom you participated in it?

A Yes.

Q Recently?

A Not recently, no.

Q Within the last several months?

A Yes.

Q Did you have occasion to speak to them about the amount of money that was involved?

A Only so far as the best of my recollection how it was, the amount was.

Q Did the person with whom you spoke give you any indication as to whether the amount you mentioned --

A My finalized amount, which was $40,000, it is

the same figure that he told me, and at that point I was positive that that was the amount of money.

Q When did this conversation occur?

A I'm not sure. I would say within the last seven or eight weeks.

Q Can you tell us, subject to the Court's ruling, with whom this conversation occurred?

MR. JAFFE: Your Honor, we object to the name of anyone.

THE COURT: Sustained.

Q Can we get a representation from the government that it is essential to law-enforcement that the name of this particular person at this point still be kept secret?

MR. JAFFE: For Mr. Dershowitz's information, although it is public record, there was testimony in the Police Department vs. Bergerson, who is a policeman who was suspended a week ago Saturday night. One of the officers who testified there, testified at that trial, the Police Department hearing, with regard to events that are recounted here.

MR. DERSHOWITZ: That no longer is a matter of privacy for the government.

MR. JAFFE: It is not a matter of privacy. There is a criminal investigation.

THE COURT: He is telling you that it is somebody named Mandatu with whom this conversation took place.

Q Could you tell us the first name?

A Frank.

Q Did you not also testify here that the usual amounts of money involved in these illegal seizures ran anywhere from $2000 to $10,000?

A Yes.

Q Other than the $40,000, of course.

Did you testify that the largest amount other than the $40,0000 amount was $10,000?

A The largest amount --

Q Other than the $40,000, putting this aside, the second largest amount was $10,000?

A Yes.

Q Did you not tell Mr. Jaffe that in one incident you took between $10,000 and $15,000 plus stolen clothing taken from a Brooklyn apartment?

A I didn't take stolen clothing from a Brooklyn apartment. The figure I told Mr. Jaffee was between $10,000 and $15,000. I was not sure exactly how much it was.

Q Are you sure now?

A Yes. Again, as sure as I was then. Between

$10,000 and $15,000.

Q Yet you testified repeatedly that $10,000 was the top figure, having in mind it could have been between $10,000 and $15,000?

MR. JAFFE: Objection, your Honor. Mr. Leuci was pressed by Mr. Dershowitz to pick a usual amount. At the time he testified he picked the usual amount. He said the amount varied. If the Professor wants to ask him about each of the amounts specified in the memorandum, we have no objection to him offering the memorandum in evidence.

THE COURT: I don't know if he wants to do that. Where are you going, Professor?

MR. DERSHOWITZ: We would like to show what we think are significant inconsistencies.

THE COURT: Are you going to show there was very much more than the $35,000 or $40,000?

MR. DERSHOWITZ: Yes.

THE COURT: Go ahead.

MR. DERSHOWITZ: By the way, we would like to admit this memorandum into evidence in its redacted form at the appropriate occasion. I don't want to interrupt my examination.

MR. GLEEL: No objection to its coming into

evidence so long as it is --

THE COURT: Under protective restriction.

BY MR. DERSHOWITZ:

Q The memorandum says that a share of this was given to blank, and stolen clothes also kept.

Is it your testimony that you did not participate in the sharing of stolen clothing?

A I was not there when this clothing was taken. I was given a share of money by another detective. The amount of money that was taken, again, I cannot -- I am not positive of it. My share, to the best of my recollection, was somewhere around $2000. I don't know for a fact that clothing was taken.

Q Did you tell Mr. Jaffe that it was your best knowledge at the time that clothing was taken?

A I had heard that some clothing had been taken, not by the raiding party of detectives but those who were there at the time of the arrest. That's the way I remember it.

Q On page 68, did you not tell Mr. Jaffe that on occasion between $2000 and $4000 was shared on arrest plus an additional $10,000 paid to fix a case?

A The money -- there was $2000 that was taken at the time of the arrest. $10,000 was paid again later

with the idea on the part of the payee that the case might be fixed. The payee was told at the time that it was not going to be fixed.

Q Did you return the money?

A The money was not returned.

Q Did you share it amongst yourselves?

A Yes.

Q So that's another instance in which between $12,000 and $14,000 was taken?

A By myself and five other detectives.

Q Did you not also tell Mr. Jaffe that on another occasion you and several other, probably not more than two or three others, took approximately $15,000 to $25,000?

A No. I don't think so. Would it refresh your recollection to look at paragraph 7 of the redacted version of the Jaffe memorandum (handing)?

A (Pause.)

Q Did you tell Mr. Jaffe on one occasion you took between $15,000 and $25,000 from X, and some of it was later given to another informant?

A Possibly $15,000. $9000 was returned to an informant, so it is $6000 that was the figure in that case.

Q As I read it, it says here you took approximately $15,000 to $25,000, and then $7000 to $9000 was given to an

informant, and it is your current recollection that the low figure prevails as to what you took, the $15,000, and the high figure prevails as to what you gave back, $9000; is that your current recollection?

A My recollection, again, from that, I know the incident, there are agents working on that particular occasion who have spoken to people who were ripped off at the time. I didn't remember how much money was taken. I remember that we returned around $9000 to the informant, and our share was, again, -- my share in that case, I think it was something like $1500. If you can get me figures -- I talked to Jaffe about it and Mr. Giuliani during the time of the debriefing. The figures are off and they have been off most of the time. I don't remember the exact figures. I always have given him higher figures more times than not. That's the way it is.

Q In other words, you are telling us what when you first were debriefed by Mr. Jaffe, et al you gave them higher figures; you exaggerated the amount of the claim initially, and since that time the figures have gotten lower upon reflection?

MR. JAFFE: I object to the form of the question.

THE COURT: Overruled.

A I think what you are saying is pretty much true.

I think at the time when I am talking about, the only time of initial debriefing as we are talking about situations, and I am trying to remember all the situations, I described the situation as I remember it.

Then I described the amounts of money that I had taken as I remembered it. Upon reflection the more I thought about it and the more I talked to -- for example, I talked to the agents at the time they were debriefing some of the people that were involved, and I realized many times that I was exaggerating the amounts of money that was taken at the time. I was always a member of a team of four or five men, and I can fairly well remember what my share was, but the entire amount of money, unless I personally was involved in taking the money myself, the entire amount, which was that $10,000 figure, I was just by myself and one other person -- I can remember that. When you get into the things where there was a rip off of a large amount of money, I am unsure, for the most part, for the total amount.

Q When you testified a few moments ago as to the correct figure involving the $40,000 rip off, you said you told Jaffe that it might have been $80,000 or even as much as $160,000?

A Not the rip off. I said the amount of money

that was there could have been as high, anywhere from $80,000 to $160,000.

Q Are you telling us you left some of the money there? There is a difference between the amount of money that was there and the amount of money that was taken?

A Half the money was taken and half was left there.

What I am saying is that there was $80,000; $40,000 was taken. I said it could have been as much when I first spoke about it as $160,000 and $80,000 was taken. But in reflection I know I got $4000 and I gave back $500. I know how many other detectives were there, and that's the amount of money: it was $40,000.

Q Did you always share the money on an equal basis?

A Money was always shared on an equal basis with the exception of the times when there was people that were not present that money had to be given to, like, supervising officers that were not there; each detective would contribute a certain amount of money and that money was sent back.

Q You told us initially when you spoke to the United States Attorneys you gave figures that were generally higher than figures you testified to.

A Not on purpose. What I did, I tried to remember

the incidents as they happened. I remember the amount of money that was there. I remember, vaguely, the amount of money that was taken, but I can remember what my specific share was in those instances. Pretty closely. I am inaccurate many times too.

Q Can you remember any other instances now as you sit here where you told the government that the amounts were more than you ultimately decided they were on reflection?

A I think I went through that a lot with Mr. Jaffe. I think during the time of the debriefing we would talk about the amounts of money I had taken over a course of a period of four or five years. I would assume a figure and think that's probably right, but more times than not I had exaggerated. Nevertheless, each incident had happened and the money had been taken. The exact amount --

Q Is it not also true that when you first spoke to Mr. Jaffe you withheld certain crimes from him and only gradually did the whole story emerge?

A The only thing I withheld from Mr. Jaffe and Giuliani was the incidents involving Mr. Lawrence.

Q Everything else that you ultimately told the government you told to Mr. Jaffe, to Mr. Giuliani, and to Mr. Puccio in the first couple of days?

A You are talking about a period of time that went

over several weeks. It was a long process of debriefing. I am sure I didn't tell them everything in the first, second or third day.

Q Did you tell Mr. Jaffe that you knew that Slim, who was the Brooklyn informant for you, was a narcotics street dealer?

A I knew that Slim was a narcotics street dealer, yes.

Q Did you also tell him you took money from Slim knowing he was a narcotics street dealer?

A Yes.

Q Did you tell Mr. Jaffe that you and your partner Mandatu -- the same Mandatu, I take it?

A Yes.

Q -- took approximately $1000 from Slim in 1968-1969?

A Yes.

Q Knowing at the time that Slim was a street dealer?

A Yes.

I would like to explain one thing --

Q By all means.

A You talk about Slim. My figure goes from three to four street dealers I knew, people I knew who were street dealers, that I had taken money from between 1966 actually

to 1969. During the course of that time my partner Mandatu and myself arrested over 100 street dealers a year from these people information and from other informants' information. That's 100 street pushers that we took off the street each year. I am not trying to say that what we did was right. What we did was not right, but I think this constant -- you talk about Slim, you can talk about any number of other people, but give us that much. There are over 100 a year. I am not exaggerating. I think there is probably more than 100 felony street pushers that were taken off the street by Mandatu during that time. We allowed those four to stay around.

Q You received money from them?

A We did, yes, which we gave to other informants and spent on ourselves.

Q You are certainly not denying that the money you received to allow these street peddlers to continue to trade in narcotics you spent for your own pleasures?

MR. JAFFE: Objection. That's a total mischaracterization of what he has said.

THE COURT: He said he in part spent it on himself.

MR. JAFFE: I am objecting to Mr. Dershowitz's characterization of the money he received from the pushers

to allow them to stay in business. The witness last week said nothing of the sort. He said he took the money regardless.

THE COURT: I will permit him to ask the question.

A I think the characterization is a little bit unfair. I did take money from these people. Some of it I used for my own pleasures. A lot of it I gave back to other informants.

It was very complicated being a narcotics detective during those years. We worked solidly six days a week, 14 hours a day. We ate out every day. We were constantly using our own cars. I had $40 a month expense account and following guys followint El Dorados. It is a whole long kind of strange story and kind of sickening story, the whole thing. Nevertheless, the bottom line is that between Mandatu and myself we put close to 1000 street pushers away during that period of time.

Q Did you tell Mr. Jaffe -- and here I am going to quote from Mr. Jaffe's paraphrase of your statement: Leuci further indicated that quite often he and Mandatu or he alone would go to see informants, stools, who were going to do something for them. He would get four or five bags, or a couple of bags of narcotics before going to

see them and would give the stools narcotics in that connection. Leuci said he followed this from 1966 through 1970.

A I don't think I did that really up until -- well, I would say a little bit in 1970,but between 1966 and 1969.

Q How much money did you tell Mr. Jaffe Slim, Conforti, and Salome gave you totally?

A Again, it would only be a guess on my part.

I would say an average between $1500 and $2000 a year.

Q For how many years.

A Between 1966-1969.

Q You got this money from them at the time when you were allowing them in deal in the streets?

A That's true.

Q Did you not give Mr. Jaffe that information in response to a statement from him regarding allegations that three narcotics dealers had paid Leuci and Mandatu for protection?

A Yes.

Q You regarded that money as protection?

A Well, I think that certainly can be construed as protection. Whether they paid me at the time or not

I was going to protect them. It didn't matter. Certainly, to answer that question fairly, I would have to say that it was money being paid to me that these fellows were not being arrested. These three people you are talking about, all three are dead now of natural causes, thank God, and so I was not concerned about having that corroborated or anything like that. I gave that. I said that happened. No one had to go out and prove it.

Q At the time of the first new trial motion you were asked about these same incidents and you denied it?

A That's true.

Q Were these people alive at that time?

A I'm not sure. I think possibly Salome may have been. I'm not sure.

Q On page 131 of the transcript of a week ago you denied that you were involved in the selling of narcotics; is that correct?

A That's absolutely correct.

Q But it is true, is it not, as you told Mr. Jaffe, that you admitted to Mr. Jaffe giving heroin to Cardi after receiving information that Cardi was selling drugs; is that true?

A No.

Q You did admit to the Government, did you not, that you gave heroin to Cardi?

A Yes.

Q And did you admit to the Government that at the time you gave heroin to Cardi you certainly knew that Cardi was involved in the drug traffic?

A Absolutely not.

Q Did you not, on repeated occasions, try to persuade Cardi to get out of the drug business?

A One occasion I told Cardi that I had heard he was selling drugs, I was going on vacation. When I came back from vacation, if I still heard he was selling drugs I would arrest him.

The next time I saw Cardi, he was in jail.

Q Did you give him drugs before that vacation?

A Yes. You have to put that in time. I had given him drugs one time prior to that, a time prior to that.

But, again, you know, to clarify it, when you say "drugs," you are talking about a $5 one-grain bag of

heroin. It was a little,tiny bit, you know.

Q What was the largest amount of drugs you ever gave Cardi?

A The largest amount of drugs I ever gave Cardi, to the best of my recollection, I would say, were ten dolphine pills, if you are going to put them in amounts, and dolphine is a drug that is used for an addict that is trying, you know, to lower his habit or quit at that time, so I'd say dolphine, for instance, if you were going to go to heroin, I would probably say two bags, three bags.

Q Did you tell Mr. Jaffe that at one point you took, or were involved in a situation where you took $220 from Cardi instead of arresting him?

MR. JAFFE: Objection, your Honor. That's a total mischaracterization of what he said to me. He said nothing of the like. He denied it.

THE COURT: How about that?

MR. DERSHOWITZ: I am reading the allegations.

MR. JAFFE: What page?

MR. DERSHOWITZ: 32, the paragraph ends with Leuci's recollection is that that money might have been taken.

A I did not take the money --

MR. JAFFE: Excuse me. "With regard to the

allegation that Leuci and Mandato, an unknown Negro and a Patrolman 'blank' were paid $220 by Cardi in lieu of arrest - Leuci indicated that the arrest was by Patrolman" -- the name of the patrolman X'd out -- the other names that are deleted are not Leuci -- "locked up defendants Freda and Russo" --

THE COURT: Go on to the other.

MR. DERSHOWITZ: "Leuci's recollection is that money might have been taken."

I am asking him whether his recollection is still that that money might have been taken.

MR. JAFFE: My objection is that the statement does not say Leuci took the money, and the Government's position is if you are going to ask the question, ask the question so the witness and the Court are not misled into thinking that the witness said something in an interview which does not appear here and in fact was not said.

Q Did you, in fact, take that money?

A No, sir.

Q Was the money taken in your presence?

A No, sir.

Q Did you learn at some subsequent point that money was taken from Cardi?

A I learned at some subsequent point that there was

an allegation that money had been taken. I didn't hear of it from any of the detectives that were there or any of the patrolmen that were there.

Q Does it surprise you to learn that Cardi had $220 in cash in his possession at that time, in light of your description of Cardi?

MR. JAFFE: Objection.

THE COURT: Sustained.

Q Did you admit to Mr. Jaffe that you gave heroin to a man named Verrichio?

A Yes.

Q Did you also tell Mr. Jaffe that you didn't know what Verrichio did with the drugs?

A No. After constant cross-examination by Mr. Jaffe, who is as good as you are in cross-examining me, I had to say that really I don't know what these guys do with the drugs that I gave to them, but they are sick heroin addicts, and I have to assume that they used the drugs, but to say that I definitely know they didn't use it, didn't sell it, I would doubt if a guy using five, six, seven bags of heroin a day would sell some bags that I gave him, but I can't positively say that, no.

Q Did you tell Mr. Jaffe that you admitted that you knew that Conforti, an informant, sold narcotics?

A Yes.

Q That you permitted him to do so?

A I permitted him to do so to the extent that he sold narcotics to maintain his own habit. I am trying to, you know, cleanse myself to whatever extent I can in those kind of situations. The truth of the matter is that Conforti was selling narcotics. I knew it. I knew he had an enormous heroin habit, also, and I made it clear, not only Conforti, Salome, and these other people, if they were selling narcotics on the scale, they were large-scale street dealers, I would close them down.

Q It is your testimony, then, that you were prepared to give heroin to small-time street dealers in exchange for money, but not the large street dealers?

A Oh, no, sir.

THE COURT: He didn't say that, Professor. He didn't say anything like that. I don't remember him once saying that he was prepared -- Lord knows, he said enough about himself, and I don't remember one occasion on which he said he gave these people heroin for money.

MR. JAFFE: In fact, your Honor, the testimony was he gave the people heroin for information when they worked for it.

THE COURT: It seems to me, and correct me if I

am wrong, Mr. Leuci, you were involved in three types of situations: one was theft; two was accepting bribes; and three was a combination of your giving some drugs and their giving some money to certain people, the net result of which was that they functioned on the street. Am I right so far?

THE WITNESS: Yes.

THE COURT: Is there any other category?

THE WITNESS: No, sir. Well, I think you have covered all the categories.

THE COURT: Go ahead.

MR. DERSHOWITZ: What I am trying to establish, your Honor, is whether or not Mr. Leuci was giving drugs knowing that they were going to be sold, and receiving money as protection for not closing down --

THE COURT: There's a long distance between saying that he furnished drugs to people for money -- that's accusing him of selling narcotics, and he has said not once but fifty times that he didn't do that.

MR. DERSHOWITZ: And it's our position we are entitled to vigorously cross-examine him to elicit --

THE COURT: You have done that before, and all I am permitting you to do now is to use that exhibit which was made available to you, but not to repeat the entire

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in fact selling narcotics.

It seems to me that inference is certainly left open by the limited denial to the allegation. But I am satisfied with Mr. Leuci's answer that he was not selling narcotics.

THE COURT: Proceed.

Q Now, as to the people to whom you gave narcotics, had you been told by other informants that these people were selling the drugs?

A You have to give me that one again, Mr. Dershowitz. I'm sorry.

Q As to those people to whom you gave narcotics, heroin, had you not been told by various other informants that these people were in fact selling those drugs?

A No, sir. Absolutely not. People that I gave narcotics to, I characterized as drug addicts, street drug addicts, junkies, of the lowest kind, the kind that would have trouble going out making enough money to buy two bags of heroin, but were valuable street informants.

Q Now, did you not testify on Page 161 that you were asked by unnamed organized crime people, or what have you, for certain advice?

A Yes.

Q Did you tell Mr. Jaffe --

A I don't know if that's Page 161 or whatever it is.

Q I am doing that as a courtesy to the Government. I am not asking you to remember the page it was on.

Did you not at one point admit to Mr. Jaffe that you were once -- at least once -- asked for a favor -- you asked a favor of Carmine Persico?

A Yes.

Q Can you tell us what that favor was?

A During -- I am not sure exactly what year it was -- in 1967, Cardi, after going to jail -- I had arrested Cardi's cousin, a man by the name of Cataldo, for sale of heroin, and to an undercover police officer. Cardi, I had threatened to arrest if I found out that he was selling narcotics. He eventually got arrested for selling narcotics and blamed me for being the one that set him up, so to speak, so that he was arrested.

Cataldo's father came to me while I was in court and offered me a thousand dollars to let his son go. I told the father that he was a little, old Italian man who worked hard for his money, he shouldn't be able to give it away to police officers. His son should know what he was going to do, and my interpretation of that was that his son would cooperate with me. I had his son paroled out on little bail, and called his son repeatedly, asking him if he was going to come out and work with us.

Cataldo's father, at that point in time, spoke to Cataldo and Cardi. Cardi was at that time in jail. And they got this whole story, together they were going to come and make allegations against me. A number of allegations came in. The first ones that they came in, Cataldo and Cardi were interviewed about them, they denied them. The father was then threatened with giving false evidence to the Brooklyn District Attorney's Office, and it became a big rigamarole. The father went back to Cardi and said, "Hey, you better come and say these things really happened or I'm going to get indicted."

So then I was called down again. I was called down a number of times. I didn't know what to do. I was in a situation at that time, if you got serious allegations made against you, and certainly the kind of allegations that Cardi was making against me, and Cataldo, I could have been put back in uniform, and that was like a major tragedy to me at that point in time. I didn't know what to do. I didn't realize that Cataldo's father had been a small-time numbers operator. I thought he was just a construction worker.

So, I wanted to speak to him, but I didn't want to speak to him directly, and I asked my cousin for advice, and he asked me to go to speak to someone. He said he

would have someone that would speak to me from that area, from that neighborhood, and I could speak to him and tell him the problem.

I went to a particular location and Carmine Persico appeared. I didn't know it was going to be him. I didn't know who it was going to be. And I told him the situation. As a matter of fact, he got upset at me. He said, "Why are you doing business with Cardi and Cataldo?"

I said, "All I want from you is that" --"would you do me a favor and speak to the father and tell the father to tell the truth, that's all."

Q Was it your belief at the time that Mr. Persico would simply talk to the father in conversational tones?

A It was my belief at the time that certainly that there was no need to do anything else but talk to the father, and, you know -- that's it.

Q Did you intend for Mr. Persico implicitly or explicitly to threaten the father?

A No.

Q Now, these allegations that you described by Cataldo and Cardi that you were so concerned about, I take it it's your testimony that at least some of those allegations were true?

A Allegations pertaining to my giving Cardi and Cataldo small amounts of narcotics were true, yes.

Q And yet you did go to Mr. Persico to try to get that story stopped?

MR. SAGOR: Objection, your Honor. There is no testimony that initially Cataldo or Cardi made allegations against Detective Leuci at the time that he may have spoken to Persico.

THE COURT: Overruled.

A It was -- I lost my train of thought. I'm sorry.

Q You went to Mr. Persico in part because you were afraid that would come out or part of the truth would come out?

A No. I went to Mr. Persico so that Mr. Persico would talk to Cataldo's father, okay, and have Cataldo's father tell exactly what happened there, that, you know, the fact of the matter is that these guys were making up this story, and to have him go in and tell the true story. If they were going to tell that I gave them narcotics, I could live with that, but they were saying I was selling them narcotics.

Q Did you tell Mr. Persico that you wanted the father to go and tell them to tell the truth, that you were

actually giving them narcotics?

A I didn't care what they said as long as they told the truth. Certainly, you know, if they were going to say that I was selling them narcotics, and -- well, you know, the bottom line is that I asked Persico if he could do that favor for me and, you know, it was never done, in any event, but I asked him for the favor.

Q Can you tell us, from your knowledge, what Mr. Persico's general reputation in the community is?

MR. JAFFE: Objection.

THE COURT: I knwo what Mr. Persico's reputation in the community is.

MR. DERSHOWITZ: I only asked the question because I don't. I assume he is a high-up in organized crime.

THE COURT: I think he is reposing at the State's expense or at the Federal Government's expense at the moment, isn't he?

MR. JAFFE: I believe he is, but I don't have the best information, but I think counsel table might have that.

THE COURT: I think he got twenty years for bank robbery sometime ago.

Go ahead. I know who Mr. Persico is.

Q Now, did you not describe in some detail a week and a half ago, under extensive questioning, an incident in which you took $200 from a defense attorney prior to in-court testimony?

MR. JAFFE: Objection. Can we have a page and ask him if he was giving some testimony?

MR. DERSHOWITZ: Transcript 179 to 186.

A Yes.

Q In describing that same incident to Mr. Jaffe, did you not tell Mr. Jaffe in that very same case you had initially made a score of between $600 and $2,000 in that very same case?

A I initially told Mr. Jaffe that I wasn't sure whether or not a score had been made in that case, but I assumed that there had been some money made in this case and if there was money made in that case, or ripped off, at the time of the arrest, there may have been anywhere between $600 and $2,000. I wasn't sure.

I remember receiving some money in that case from some other detective -- vaguely remember it. I am not clear on it. But, in any event, yes, I guess is the answer to your question.

Q If you would please refresh your recollection by looking at Paragraph No. 4 and see whether that reflects

any doubt about whether you gave -- whether you received $600 to $2,000 as a score in that case.

MR. JAFFE: Could you give us the exhibit, the page number, so the record is clear at least as to what you are showing the witness?

MR. DERSHOWITZ: It's the Jaffe memorandum --

MR. JAFFE: That's Exhibit 8, Mr. Dershowitz.

MR. DERSHOWITZ: -- Page 68, Paragraph 4.

THE COURT: Read the question.

(Record read.)

THE COURT: You mean you are asking him to say whether Mr. Jaffe reflected any doubt as to whether or not he made a score in this case?

MR. DERSHOWITZ: No, I am asking him whether or not this memorandum reflects a doubt about whether or not in this particular case there was a score of $600 to $2,000.

A You know, I would guess from reading the memorandum that it doesn't reflect any doubt. I still have doubts. You know, I am not positive about it. I think the money was made in that case, and, in any event, the situation involving $200 actually, you know, is clear in my mind. The part of the money that was taken at the time of the arrest is unclear. It wasn't taken by me, and I did remember getting some money in that case, but I don't

remember how much, and again that's a problem I had, and I guess I should have tried to be more accurate, but I made the figure between $600 and $2,000, and it was a typical kind of figure, and I really could be way off.

Q Do you have any better recollection as you sit here today? As you sit here today, are you fairly certain in the same case that you took $1,000, it was the same case involving the $600-$2,000 figure?

A Yes.

Q You are sure now it was the same case?

A Yes.

Q Were you sure a week ago Monday it was the same case?

A Yes.

Q And yet, when I asked you extensively about that case, you did not volunteer the information that in the same case there was a score of $600 to $2,000?

A A week ago Monday?

MR. JAFFE: Excuse me. My objection is what was testified to or answered to questions, if Mr. Dershowitz doesn't ask the proper questions, he doesn't get the answers he wants. That's his problem, not the witness' problem.

MR. DERSHOWITZ: The problem, your Honor, is that

we didn't have the memorandum at the time we asked the question.

THE COURT: Is that an objection?

MR. JAFFE: Yes, your Honor. I started off by saying,"I object."

THE COURT: Sustained.

MR. DERSHOWITZ: For the Government to object --

THE COURT: Mr. Dershowitz, your question, I believe, used the language, "you did not volunteer in answer to questions." He is not required to volunteer anything. That's the basis on which the objection is sustained. He is here to answer questions; he is not required to volunteer.

MR. DERSHOWITZ: It seems to me the Government was under an obligation to volunteer the information if they had the memo in front of them, knowing we did not have the memo in front of us, knowing the witness was giving testimony.

Q You told us a few minutes ago that you gave Conforti drugs because you knew he had difficulty supporting his habit?

A I never said that.

Q I'm sorry. Would you tell us what your description is of Conforti's situation at the time of the transfer of

drugs?

A The only drug transfer that was ever between myself and Conforti, on several occasions I went to Conforti and took drugs from Conforti, small amounts, five or six bags to seven bags at a time. I took drugs from him.

Q Was it your testimony that Conforti was a relatively small-time dealer who was selling drugs only to support his own habit?

A Conforti --

MR. JAFFE: Objection. That was not his testimony. His testimony had to do with Cardi, not with Conforti.

THE COURT: Put the question again.

Q Would you tell us now, so the record is clear, what your characterization is of Conforti? Was he a drug dealer?

A Conforti was a street dealer. I would put him -- he wasn't a low-level, strictly-for-his-own-habit street dealer, but he had an enormous habit, so he was a street dealer, and he had a street operation that was larger, I would say, than a corner, you know, bag-by-bag street dealer, but he was a street dealer and he wasn't any type of high-echelon narcotics dealer.

Q Did he give you money?

A He gave me money? No.

Q Did you give him money?

A I never gave him money.

Q Were you aware Mr. Conforti owned a grocery and candy store and several businesses?

A He didn't own anything. He rented a candy store. He rented a grocery and he -- on which he never paid the bill for.

Conforti used about -- if you can believe this -- a quarter of an ounce of pure heroin a day, which is an amount, a total of about an ounce of heroin a day, for his own habit. He eventually died of advanced heroin poisoning. Which cost him, God only knows how much money. That's a quarter of an ounce of pure heroin can make an ounce of the street, regular heroin, 465 bags of heroin a day, almost. That's the kind of habit Conforti had.

Q Did you not testify, on Pages 179, 181, 192, that you took money from private attorneys on only two occasions, which you described?

A Yes.

Q Did you not tell Mr. Jaffe that in another arrest --

MR. JAFFE: Page?

MR. DERSHOWITZ: 70 of the Jaffe memorandum.

Q -- "Later on 'blank' gave money to Leuci, possibly from a lawyer on the case"?

A Yes.

Q Is that yet another incident?

A Well, that is an incident that I'm not sure whether or not that money came from the attorney. I can only assume it did. It didn't come to me, in any event, from the attorney.

Q Can you tell us the information on which you assumed that the money came from the lawyer?

A I'd have to see the --

Q You mean,as you sit here now, you don't remember what incident that is?

A The situation involving Mandato, Mandato gave me some money. I don't remember the case exactly, and at this time I remember Mandato saying something to me, like the money had come from the attorney. Now, I'm not sure. I remember Mandata giving me money at one time, where he said that money had come from an attorney in the case.

Now, I am not sure if that's what you're --

Q How much money was involved in that case?

A It was a small amount of money; again $50 or something.

Q No. 12 (document handed to the witness.)

A Let me see.

MR. JAFFE: Exhibit 8, Page 70, Paragraph 12, so the record is clear.

A Okay. Okay.

Q Is that the incident you have in mind? Is that the Mandata incident?

A Yes.

MR. DERSHOWITZ: Your Honor, at this point, it occurs to me, in light of the fact that the Mandata incident has now been made public, Mr. Jaffe indicated it's a public record that Mandata was tried, obviously I can't be expected to know about all public records involving names of people who have been redacted, we would like to ask the Government to make a careful search of its files and to indicate in every instance where it's no longer of extreme necessity to withhold the names, so that we can pursue our investigations to determine whether or not Mr. Leuci has further crimes to which he did not admit and, most importantly, whether or not any of these charges made by Mr. Leuci are false, so we can make an argument that Leuci has made false accusations against people, which would go precisely to the merits of our defense.

MR. JAFFE: Mr. Mandato was not recently tried. Detective Ferguson was recently tried. Mandato testified

there. That's one of the few cases that have come out.

The other cases are all under active investigation by both this office and other State offices, and the Government would absolutely resist, although if your Honor orders, we will turn it over, disclosure of any names.

THE COURT: I shall not require that.

MR. JAFFE: Just to finish the statement, your Honor.

The allegation now made that Leuci is going to falsely accuse people, and that the defense be entitled to find out every witness involved in that case so that they can prove Leuci is not telling the truth in this case is absolutely absurd. The other witnesses have testified. The Government has information concerning each of these different situations, and if we had any inkling that Leuci was telling us a falsehood in any of the cases, I'd stand up here now and tell the Court now.

MR. DERSHOWITZ: It's not unheard of that Leuci would put something over on the Government. It has happened.

THE COURT: Proceed.

MR. DERSHOWITZ: We would hope the Government would see itself as having a continuing obligation every time new information became public or became -- it became

nonessential for the Government to keep it secret, the Government would have a continuing obligation to make that information available to us.

MR. SAGOR: Your Honor, I object.

THE COURT: You mean from here to eternity?

MR. DERSHOWITZ: From here to eternity, essentially.

THE COURT: All right. You have stated your expectation on the record.

MR. SAGOR: I'd like to state for the record that the Government's position is we dashed those expectations. Detective Leuci has testified to countless crimes. To look for one more to get the sordid details of another is just irrelevant for these proceedings.

As your Honor certainly said at the beginning, this is a case involving tapes, involving Mr. Rosner's active participation in a crime, and Detective Leuci can testify from here to eternity, and it would not make Mr. Rosner's involvement in the crime any less.

MR. DERSHOWITZ: If Mr. Leuci was certain to be revealed as somebody who has made false accusations, that would be a relevant matter on testimony given by Leuci at the trial.

As long as the case is not moot, as long as it

continues to exist as a viable piece of litigation, it is our position -- I withdraw "from here to eternity," and make it a much more specific request. As long as the case is not moot, as long as the petition for a writ of habeas corpus could appropriately be brought, it is a continuing obligation of the Government to reveal to us information that the only reason they are able to withhold is a claim of extreme importance, the purpose of law enforcement administration.

MR. JAFFE: Your Honor, except for names and maybe the absolute minor specifics, Mr. Dershowitz has an outline of everything we have gotten from Mr. Leuci. We prepared it in a memo, we redacted it so he would have it. He knew at the time Leuci began to testify he'd get that memorandum showing everything that Leuci had said to the Government. Now he has that memorandum, it seems to us he has gotten enough.

THE COURT: All right. Go ahead.

Q On Page 211, did you not testify that you gave Lawrence and his brother-in-law about $500, and did you not also say, "I don't think it was as much as a thousand; it was around $500"?

A Yes.

Q On Page 18 of the Jaffe memorandum, did you not

tell Mr. Jaffe that -- I am quoting from the memorandum -- "Leuci indicated that Leuci gave Lawrence $1,000 for himself and Lawrence's brother-in-law for their help on the arrest, but did not give Lawrence any narcotics"?

A Yes -- I mean, we are going over that whole business about Lawrence and that particular situation at the Simpson Street station house where Lawrence was given narcotics by another detective over my objections, some time thereafter, and with Lawrence's brother-in-law, and I gave him an amount of money. I didn't give Lawrence any money in that situation. I gave Lawrence's brother-in-law somewhere between $500 and -- around $500. It was less than a thousand dollars; five or six hundred dollars.

Q Did you tell Mr. Jaffe that you thought it was a thousand dollars?

A I said somewhere between $500 and $1,000, and you are talking about a time prior to the time when I described the actual incident itself at the Simpson Street station house.

Q You testified on Page 236 that allegations made against you by Robert Torres involving gambling were untrue.

A Is that a question?

Q That's correct.

A Yes.

Q What did you tell Mr. Jaffe about Mr. Torres?

A That I hardly knew Torres, and I don't know whatever allegations he made against me, I don't understand where it was coming from or where he was coming from, yes.

Q Now, again, I have a problem here in terms of redactation. Here is a paragraph in which there are some names redacted and some not. I am not going to ask you, in light of the Judge's ruling, but if you would read this on Page 41, Exhibit 8, no paragraph number, and indicated whether the redacted name is or is not Torres, the name Torres appears in various points in that paragraph, so I wouldn't think it would be any revelation to indicate if that name was Torres.

A It's not Torres.

Q It's not Torres?

A No.

Q Did you tell Mr. Jaffe that at one point a fire was started in order to gain entrance into an apartment and as a result of that fire being started you then took approximately $1000 to $2000 from that apartment during an arrest in the East Village?

A That's a heck of a description of that incident.

Q Look at this and see if that's not an accurate description of the way Mr. Jaffe characterized the incident (handing).

MR. JAFFE: I don't think Mr. Leuci, who does not know the operation of my mind, is competent to testify as to how I prepared the memorandum. I object to that question.

THE COURT: Sustained.

Q Would you tell us about the incident in your own words, please.

A Myself in the company of three other detectives had a search warrant for an apartment in the East Village. The fellow inside the apartment was supposed to be a very violent guy and we could no way of getting into the apartment. Where my partners put some garbage next to the door and lit it on fire. We blew smoke underneath the door and yelled "Fire." The guy came running out of

the apartment.

We then searched the apartment, arrested him, and some time later on one of the detectives came to me and said he had $1000 that he had found in a book and gave me $500.

THE COURT: Found $1000 where?

THE WITNESS: In a book.

Q How many detectives were involved in that?

A Four.

Q And your share of $1000 was $500?

A Between $250 and $500.

Q Was the seizure in fact between $1000 and $2000?

A I don't think it was $2000. I'm sure it was $1000.

Q Did you not tell Mr. Jaffe it was between $1000 and $2000?

MR. JAFFE: May I have a page,please?

MR. DURSHOWITZ: Page 69.

A Probably. I'm not sure of the figure. I think it was $1000 and it was $250 apiece.

Q Did you find drugs in that apartment?

A Yes.

Q What did you do with the drugs?

A We arrested the defendant. There were -- Basically, it was as I had typed -- marihuana, LSD, and

things like that.

Q Did you keep the drugs?

A No, sir.

MR. DERSHOWITZ: May we have a moment, your Honor?

THE COURT: Yes.

(Pause.)

Q You testified a few minutes ago that you told Conforti that if you learned he was selling any drugs you would arrest him; is that correct?

MR. JAFFE: Objection. That was not his testimony.

Q Tell us what your testimony was in that regard.

A Cardi is who you are talking about. I told Cardi. I actually didn't tell him. I heard that Cardi was selling narcotics, and I told a couple of persons in the street that I am going on vacation and if I hear that Cardi is selling narcotics when I get back I am going to arrest him.

Q Did any such conversation occur in relation to Conforti as well?

A To Conforti?

Q Yes.

A No, only to the extent that if I found out that

Conforti was engaged in large scale narcotics distribution, what I considered large scale -- at that time I am talking about a street level dealer.

THE COURT: Listen, Professor, find something new to go into because I am getting tired of hearing the same stuff all over again.

MR. DERSHOWITZ: I think we have something new. We are preparing it. It will take one minute. It is with respect to the tape that we got this afternoon.

(Pause.)

MR. JAFFE: Would it help if we took a recess and he could finish going through that transcript and then we can do it all at once, your Honor?

MR. DERSHOWITZ: We would like at least to begin to ask Mr. Leuci as many questions as we can on the basis of that transcript so that in the event we read it and find there is no more we would not have wasted time; but we cannot make a representation that that would be all based on a complete and reading of the tape.

THE COURT: I think the government's suggestion is a good one. We will recess until tomorrow. You can study it and cross-examine him about it after you have had the evening to consider it. In other words, I do not think it fair to the government for you to have one shot at him today

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and then another shot tomorrow morning. Plan your examination, get it ready, and you may have as much time as you need to examine. I do not think it is an appropriate way to proceed.

MR. DERSHOWITZ: It seems to me we just now learned about the existence of this --

THE COURT: I am not criticizing you. I am going to tell you that we are not going to bifurcate this case, we are not going to split it up.

MR. DERSHOWITZ: If we have ten minutes we can ask him all the questions --

THE COURT: I will be happy to take a recess. Youcan take a look at that.

Have you now completed everything except that which has to do with the transcript?

MR. DERSHOWITZ: Almost but not quite.

THE COURT: Complete it now.

MR. JAFFE: So the record is clear, since the Professor has gone on quite some length in examining Mr. Leuci about Exhibit 8, the government now feels there is no reason to have the record cluttered up with things that have been testified to, and we could introduce this 77-page document. It is available as a court exhibit already. It has been marked for identification.

So that the Court of Appeals --

THE COURT: I have seen it and I have read it. I do not see any point in having it available for general dissemination.

MR. DERSHOWITZ: Your Honor's ruling is clear. It would be admitted into evidence subject to all the same restrictions.

THE COURT: As long as it stays with counsel I have no problem with that.

MR. JAFFE: Our thought is, your Honor, that the document, as it stands, is a document that was prepared by me without the assistance or knowledge of the detective. There is no testimony on the record as to what is in it, what it was intended to be, what my shorthand abbreviations and a memo to the file are intended to be, and for that to be affirmative evidence of what Leuci supposedly said is a position the government does not want to take.

THE COURT: It is evidence of what you recorded it as, and I will give it such weight and I deem necessary.

It will be received.

(Government's Exhibit 8 received in evidence.)

MR. DERSHOWITZ: I think we will be very brief at thistime, your Honor

BY MR. DERSHOWITZ:

Q Did you not testify at page 111 in the transcript that you had given Lawrence narcotics on only one occasion and had been present when narcotics were given to him on one other occasion?

A Yes.

Q Did you not tell Mr. Jaffe yet of another occasion when you were present when Mr. Lawrence found a bag of cocaine in the front seat of your car, which Lawrence then snorted?

A Yes.

Q Is that an additional occasion to the one you testified to?

A It is not additional. I don't know where he found it. He found it in the seat of my car. Somebody had tucked it in there. The next thing I knew he had it out and he was snorting.

Q You were aware of that?

A I was aware of what?

Q The fact that he took it and used it for his own purposes.

A He took it and swallowed it like a vacuum cleaner before I had a chance of saying whether he should or should not use it.

Q This is a separate occasion to the one when you say you were present on only one occasion when narcotics was given to him?

A I didn't give him the narcotics. It was in the seat of the car. It was on the side of the car where he was sitting.

Q Was there not also an occasion that Lawrence kept a pound of marihuana from an arrest that Lawrence helped to set up?

MR. JAFFE: I object to the form of the question.

THE COURT: I will permit it.

A There was a situation that Lawrence wound up with a poind of marihuana. It was not an arrest that he set up. It was a --

THE COURT: Don't go over that again. I remember it from the first time around. Proceed from there. He testified about this originally when he was telling us about his sins, this pound of marihuana.

Q Have you ever before this testified you were present when the Baron took a pound of marihuana?

A I saw a pound in the Baron's car after he and I had been involved in negotiation of buying some marihuana from some people. After the arrest the Baron drove up and I saw a pound of marihuana in the car, and I asked him

where he got it from, and he said he got it and that it was his.

Q Did you tell Mr. Jaffe that you had knowledge that the Baron was repeatedly involved in taking "early delivery drugs," as you put it?

A No. Mr. Jaffe wanted to know from me why the Baron would stay with me and how I assumed he got some of his narcotics from the cases that we worked on, and this is over the years of dealing with the Baron, and over the years of seeing how he operated. This is how I assume he did things. I assume that's the way he did it. I confronted him with it once or twice.

Q Did you not tell Mr. Jaffe, on page 15: "Leuci did indicate he believed he knew the way Lawrence obtained some narcotics. Lawrence would on cases on which he was acting as an informant for Leuci probably do the following: Lawrence would order a package from the source who was the target in the investigation. Lawrence would take a partial delivery and thereafter when the rest of the order was to be delivered the source would be arrested with the rest of the drugs. Lawrence would have gotten delivery of an ounce on a prior day to the arrest and since the source was arrested Lawrence would not pay for whatever drugs he had previously delivered.

THE COURT: That's what he said here today. That's precisely what he said previously of his modus operandi with this fellow, the Baron. In fact, he would set these people up that he would get a sample from. I didn't realize the sample to be an ounce. He would get a sample. He would arrange to have the fellow arrested the following day. The fellow would be arrested the following day and the Baron, so-called, would keep the sample. He said that not only today, but he said that repeatedly. There is nothing new about that.

Q Did you tell Mr. Jaffe that Lawrence had in fact, told you of this procedure?

A I confronted Lawrence with that a number of times. One time he did tell me, "I have been dealing that way even before you were around."

MR. DERSHOWITZ: I think we might --

THE COURT: We are not going to stop until we stop with this aspect of the examination. When that is concluded, we will take a recess until you want to come back. If you want to come back tomorrow, you can do that; otherwise, take a 15-minute recess. I do want to finish with this aspect of the examination before I do that.

MR. DERSHOWITZ: We would like to do that. We would like to take this recess.

THE COURT: You have concluded with Detective Leuci with the exception of --

MR. DERSHOWITZ: Other than matters that I raised in the transcript.

THE COURT: We will take a 15-minute recess.

(Recess.)

(In the robing room.)

THE COURT: I don't think we will get to you today, Dean. I think you can see the urgency of my getting this hearing then. I don't know what to tell you. I hate to bring it back unnecessarily.

MR. DERSHOWITZ: I have proved everything that I am about to prove on my charge of deliberate withholding of information of the Coe memorandum from the Supreme Court.

THE COURT: Let's just assume that the Dean is here in case I don't believe you have proved what you said.

MR. DERSHOWITZ: That's not our position. I think our position is that without regard to whether you conclude that I proved it or not, there is no conceivable basis in any disciplinary rules or regulations for anything but commendation of an attorney for raising a point which he, in good faith --

THE COURT: You and I differ as to what is open to me. I will refer the matter to the Bar Association and

let them determine it. That's the alternative you are giving me. I am willing to take it.

MR. FREEDMAN: It may be useful if I took, perhaps, ten minutes at the close of whatever the proceedings are today to address the issue in a general way.

THE COURT: I will be happy to hear you.

(Recess.)

Q You testified earlier that there came a time in March of 1971 when you surreptitiously recorded a conversation with Richard Lawrence; is that right?

A Yes.

Q And at that time you, of course, knew the conversation was being recorded with Richard Lawrence, and he was unaware that the conversation was being recorded?

A That's correct.

Q And can you tell us on whose instructions this recording was made?

A At that time, Special Assistant United States Attorney Nicholas Scoppetta had just left the Knapp Commission, and the Knapp Commission had within it an investigation involving Lawrence and a possible killing of a guy in the Bronx and the maiming of another guy, involving two detectives and Lawrence. Scoppetta asked me my feelings about that, and I said that I didn't believe, really, that the Baron was involved in that. I didn't believe he was, I said, but I could put it to him and we can find out if he was involved or not.

There were two other -- there's a lieutenant and a detective in the back seat of an automobile with Lawrence, and the end result was two people in the front

seat of the automobile, one was killed and one was maimed, and Scoppetta asked me to surreptitiously make a recording with the Baron and bang on him real hard about that incident.

So, the Baron got into my automobile -- it was a wired automobile -- and I recorded the conversation with the Baron where I talked to him about that particular incident, and we had a long conversation.

Q And you also discussed other matters, such as drugs, I take it, in the discussion?

A We discussed, you know, we discussed the Baron -- that transcript, again, like I say, and you take things out of that transcript, take them for what they are, but let me see them as they come out, and I will explain them to the best of my ability, but you must remember that I had the facility in that car to turn that machine on or off, and it was turned on the minute he got in the car and it was turned off the minute he came out.

I had complete control of that conversation.

Q Did you testify earlier when I asked you if you had suggested a procedure to the Baron that this was a procedure that he was well familiar with?

A As far as I was concerned, it was, and I always believed that's exactly what the Baron was doing to me over

the years.

Q Do you recall the following discussion --

MR. SAGOR: Excuse me. Is the witness finished with that answer?

THE COURT: I believe he had. Had you not?

THE WITNESS: Yes.

MR. SAGOR: Thank you.

Q Do you recall having the following conversation with the Baron when he was asking you about drugs?

THE COURT: In this recorded conversation?

MR. DERSHOWITZ: This recorded conversation.

THE COURT: What page of the transcript?

MR. DERSHOWITZ: The transcript doesn't seem to have pages.

MR. JAFFE: In the upper left-hand corner.

It says Page 33, and it's rubbed out. It's hard to see. The first word on the page is "magnificent."

THE COURT: All right. Go ahead.

Q "Leuci: You know, the story with you is always the same story. Now, let me explain something. The easiest way for you to get a package is to make a case, right?

"Baron: Make a case?

"Leuci: Yeah. Am I right or wrong?

"Baron: No, no, no, no. How the hell am I gonna -- how the hell is that going to work?

"Leuci: Oh, come on. What are you talking about?

"Baron: What do you mean so -- so -- what do you -- what do you mean? How the hell is -- how is that gonna work?

"Leuci: If you make a case.

"Baron" Yeah.

"Leuci: And there's a seizure.

"Baron: Yeah.

"Leuci: You get a piece of the package, right?

"Baron: No. Not necessarily. How -- how do you figure that?

"Leuci: Have we ever made a case where you didn't get a piece of the package?

"Baron: Have we ever made a case that I didn't get a piece of the package? Oh, man, I don't know what the hell you talkin' about. I don't know what you tal[illegible] about. Have we ever made a case that I didn't get a pi[illegible] of the pack- --? Hell, we've made a whole lot of cases that I didn't get a piece of the package. I don't know what the hell you talkin' about. Shit! That -- that -- that -- if that was the case, I'd 've been straight now.

But -- have we made a case and I get a piece of the package --

"Leuci: No, I'm not talkin' -- you know --

"Baron: I'd be sitting on the top of the world.

"Leuci: Yeah, right. But we really never made, you know, like when we were fallin' over fuckin' packages.

"Baron: Right.

"Leuci: You know, I agree with you there.

"Baron: Right.

"Leuci: But, I -- I would think that the easiest way to go up and you know -- you make it understood before you mkae the case. Look, I'm gonna make this case. We're gonna do something. Whoever you're working with. With whoever you're working with. So it takes you four days to make -- whatever bullshit case -- like you get a guy with an eighth half, whatever.

"Leuci: It is." And then there is one second of unintelligible. "And you get your hands on something -- three owners, four owners, and you're home free. Right?

"Baron. No man. You can't do things like that.

"Leuci: Don't you tell me you can't do things like that.

"Baron: You can't do things like that.

"Leuci: Well, I don't know."

Two seconds untelligible, and then it's not clear who is talking. Two seconds. It's not clear at this point who is talking.

"Man, I tell you now. That's -- that's -- that's -- the easiest way for me to get out from under.

"Leuci: Yeah, right.

"Baron: But my -- no, no, no, no, no, not like you say. I'm talkin' about -- with going to the 'Sky.' The day you get up and talk about going to a skylock, you better give yourself a thorough fuckin'" --

A "Shy" is the word.

Q Do you remember that conversation?

A Yes.

Q And is that the conversation you were referring to in which you made a suggestion to the Baron about a procedure and you say that he was fully aware of that procedure, fully familiar with it?

A That's the one of the conversations I had with the Baron where he completely denies ever doing that. He had been doing that, as far as I was concerned, for years, and at one time he told me that he had been doing that long before he had met me.

During this conversation, now he comes out and he says that he never did that before. What he was trying

to do is convince me to go to a shylock for him and borrow money, and I was trying to convince him to go out and make a case, that was the way for him to make money, because that's the way he had been doing it over the years. Same thing; he had always got a package.

In his affidavit to you, he said clearly that he never got a package from me. The Baron talks out of both sides of his mouth and his ears at the same time.

THE COURT: Just talking about a piece of package as opposed to a sample the day before, you know, that's something else again, isn't it? Do I make myself perfectly clear?

THE WITNESS: I understand what you are saying, but that is not necessarily true. The package itself is the target. I mean, the package is the half a kilo.

THE COURT: The delivery that results in the arrest.

THE WITNESS: Right.

Q At the time you had this conversation with the Baron, did you believe that he knew that the conversation was being recorded?

A Do I believe that he -- absolutely not.

Q You are pretty sure he didn't know the conversation was being recorded?

A Absolutely not.

Q So that the statements that he made, he made to you not knowing that you were working undercover for the Government, and that you were recording conversations?

A Yes, but that doesn't change the Baron's characteristics. He's lying constantly.

Q Do you remember a point where the Baron made the following statement to you, on Page 37:

"I could -- listen -- listen what I'm saying. I can -- I can get a package tomorrow that I could do a five with. And you know what -- you know what they done come out with? A new thing now. They are sellin' like -- you were selling a seventy-five dollar bundle before. You know, the -- the five dollar bags.

"Leuci: Yeah."

Do you remember that conversation?

A Come on, counsel.

Q Will you answer the question?

A What do you mean, I remember the conversation, but reread that thing and let me -- you can bet that he didn't say that what you're selling --

MR. SAGOR: Will you show me where you are reading from?

MR. DERSHOWITZ: Yes, nine initials of ES:ko B --

MR. SAGOR: That doesn't mean anything.

MR. DERSHOWITZ: All I know -- the page before is 37.

MR. SAGOR: I think my initials are on the top left-hand corner. "B" refers to the Baron.

THE COURT: Come on, gentlemen.

MR. DERSHOWITZ: It's the page after 37, and there appears no number on the Government's transcript.

Q The words appear as follows, and I am reading accurately and exactly:

"They are sellin' like" -- three dots -- "you were sellin' a seventy five dollar bundle before. You know the" -- three dots -- "the five dollar bags."

Your response: "Yeah."

A I can guarantee you that's not what was said.

THE COURT: Let me see that, please.

(Document handed to the Court.)

THE COURT: Look at that (handing document to the witness.)

THE WITNESS: Oh, okay.

A Now, counsel, you know, you're a professional, a lot more intelligent than I am. What he says they are selling like --"you were selling a $75 bundle," meaning "you" -- I'm not sure of the exact English grammatical

word term that's being used there, but "you," meaning him, and jolt pushers.

Q Meaning using "you" to mean "him"?

A Like you were selling a $75 bundle before, meaning him, not me.

THE COURT: I think what he is suggesting, Professor, is that if the Baron were educated in accordance with his high station in life, he might have substitued the word "one" for "you."

Do you understand?

THE WITNESS: I'm not sure. But I know he doesn't mean me.

They were selling, like you were selling a $75 bundle before, right? But he's not talking about me.

THE COURT: I understand what you are testifying perfectly.

A That was really a dirty one.

MR. DERSHOWITZ: May the record reflect that last comment.

Q Would you repeat that last comment?

A I said that was really a dirty one.

THE COURT: The record will reflect that.

Q Do you recall the following statement made by the Baron to you --

MR. SAGOR: Your Honor, could we insist on a page, or courtesy --

MR. DERSHOWITZ: It would have been delightful to give a page if there would have been one.

MR. SAGOR: Fine. We could have conformed it --

THE COURT: Look over his question.

MR. DERSHOWITZ: It's approximately the sixth page from the end, no number from the top or bottom.

MR. SAGOR: It's a little easier.

MR. DERSHOWITZ: It's a little harder when it's the thirtieth page from the end.

THE COURT: We are wasting time. I order both of you to stop.

Q -- "Well, o.k. This is what you told me. You say, you say, you say if them guys didn't call you shortly, then I'll see that you get something my god damn self."

Now, by the word, "I'll see," what was meant in your particular usage?

MR. JAFFE: Excuse me, your Honor. May I hand a copy to Mr. Leuci? Maybe it will make things more cogent.

May we have this marked Exhibit 22 for identification?

THE COURT: Yes.

MR. JAFFE: That's six pages from the back, in the middle of the page, your Honor.

(Government's Exhibit No. 22 was marked for identification.)

Q I'd like you to tell us what you meant by the words, what you think --

A Can I finish reading it?

Q By all means. Take your time.

MR. JAFFE: May the record reflect, your Honor, that the speaker, at least as indicated on the transcript in front of me in the language just quoted, is Lawrence and not Leuci.

MR. DERSHOWITZ: The record does in fact reflect that. I said it was a statement by the Baron.

A Can I read from it?

Q Sure.

THE COURT: What is the question referring to, Professor?

MR. DERSHOWITZ: When the Baron said to him, "You say, you say if them guys don't call you shortly, then I'll see that you get something my god damn self," who was the Baron referring to in using the words, "I'll see."

MR. SAGOR: I have a basic objection on competency,

unless we are talking about drugs as opposed to purchases or money.

THE COURT: I don't know what we are talking about, Mr. Sagor. I am inclined to find that out from this witness.

Overruled.

A What the Baron did, he was talking -- you stopped in the middle of the paragraph. May I continue reading the paragraph?

THE COURT: Yes, of course.

A "That what you said." Now the Baron is still talking. "That what you said. I say -- when you say that, I say fuck it. I say I'll sit back and you know -- and I ain't goin" --

And I say, "Well, I might have been a little bit excited."

Okay? So, at some prior time, at some prior conversation, when the Baron is crying to me that he's broke and he can't do anything, or anything, I say, "Don't worry about it. Some day" -- you know -- "if it has to be, I'll take care of you myself."

Okay. That's true. All right.

Q That's all I'm asking.

A No, that wasn't what you were asking. You

stopped it in the middle, and the thing is explained, I had never done it before, and that's clearly in there, too.

Q Would you show us where it says you had never done that before?

A I will show it to you right in the transcript.

THE COURT: Go ahead.

MR. DERSHOWITZ: Your Honor, while he is reading that, may I make one statement for the record? We sought to introduce this Jaffe memorandum in evidence --

THE COURT: Which memorandum?

MR. DERSHOWITZ: The Jaffe memorandum in evidence in order to avoid the repetitious aspect of simply going through each and every allegation. What I would elect to do is in our brief point out whatever inconsistencies there may be between the Jaffe memorandum and between what Leuci testified to at trial. Most of them have been brought out, but there are others which have a repetitive, accumulative quality, which we would not feel it necessary to bring out in open court, but might feel it necessary to refer to in the brief.

MR. JAFFE: Your Honor, that's precisely what we want to avoid, and for the reasons we stated before. That memorandum is what the writer -- that's myself -- put

together.

THE COURT: Please don't repeat that.

I have got to tell you that the time has come in the course of this case when I am getting a little tired of hearing the same thing said four, five, six and seven times. I remember perfectly well what you said. You might remember what I said, that it was received in evidence and I would give it such weight as I saw fit.

That disposes of the matter and you may, of course, include it in your memorandum.

MR. JAFFE: Very well, Judge.

A I'm sorry. I have to look through this transcript. One minute.

THE COURT: Why don't we go on? You can look through it later.

Go ahead,Professor.

Q Okay.

Did there come a time when you made the following statement in the recorded tape:

"I always tell you the same thing" --

MR. SAGOR: May we know what page, again?

MR. DERSHOWITZ: This is Page 13, with no other number.

Q -- "You're the connection. You" -- one second

inaudible -- "the package. And you work for me and I protect you. And I mean that's the way things are supposed to go. Now, I don't know how, you, you know, like in the past, you had a nice thing going with Scotty and George, whatever that was," et cetera. I am not completing the paragraph. I think I have read you the relevant points.

Do you remember saying that?

A Yes.

Q "You work for me," "I protect you," "You're the connection," "You" -- blank -- "the package"?

A Are you telling me this is on Page 13?

Q 13. The last paragraph under the word "L" that stands for Leuci.

A How about reading the paragraph right above that? That's what I was looking for.

THE COURT: Go ahead. Why don't you read it?

THE WITNESS: "Ya know" -- this is me talking, your Honor -- "Ya know how many, how many years have you been after me to get you, to give you a package? As long as I know you you've been after me to give you a fuckin' package."

And the Baron says, "Right."

And then I say, "Right." And then, "I always tell you the same thing. You're the connection." "You sell

the package" is what is that inaudible. "And you work for me and I protect you. And I mean that's the way things are supposed to go. Now, I don't know how, you, you know like in the past, you had a nice thing going with Scotty and George, whatever that was. Let me tell ya those guys -- that's the reason Scotty's the way he is about you. I would never have to feel that way about you. But Scotty feels that way about you because he thinks some day in the future, you're gonna get up and tell your story and ask this other shit, you know and" --

And then the Baron says, "Or write a book on it."

And I said, "Or write a book."

Q Fine. You did, however, make a statement that "You're the connection, you" -- whatever -- do you remember what that word was, "You sell the package," "You get the package," or what?

A I think it's something like that. I think it was "sell."

Q "And you work for me and I protect you. I mean that's the way things are supposed to go"?

A Yes. Okay.

Now, are we interpreting the word, "work," counsel?

Q Would you like to give us your interpretation for it?

A He was my informant and he works for me and I protect him. He doesn't do a day in jail as long as he works for me, and that was our understanding. He sells a package. He's a dope pusher; I'm a cop. I don't sell him dope, and that's the way that -- I keep him out of jail.

Q What is the usual meaning of the word, "connection"?

A In dope, in narcotics business, it's the supplier.

THE COURT: It's 4:30, Professor. How much longer do you think you want to go?

MR. DERSHOWITZ: I think we are going to be very brief at this point, and the Government and we during the recess had both agreed, if I represent it correctly, to ask you if you would be kind enough to consider continuing until we dispose of the matter, because we really do think we can dispose of the entire hearing today.

THE COURT: Well, that depends on how long you intend to go along. I don't propose to sit here until 8:00 p.m., no; I don't do that.

MR. DERSHOWITZ: No, but I think we can finish within ten minutes with this witness.

THE COURT: All right. That would be splendid.

gp1 Leuci-recross

MR. DERSHOWITZ: Based on the assumption that these transcripts reflect accurately the tape and nothing new will come out in intonation, which we have no reason to suspect, we have no further questions.

What we would like to do is borrow the tape overnight and we will inform the government and your office as to whether or not we would want to recall Mr. Leuci for any further questions.

THE COURT: If you do want him recalled I want him recalled tomorrow. I want the testimony concluded. I want you to have a chance to brief your side and the government a chance to respond. I will sit from day to day until we complete the testimony.

You have your arrangements made with Mr. Sagor and I shall be available to you after a couple of sentences tomorrow morning at 10 o'clock. But I insist now that this matter go forward on a day-to-day basis until the testimony is concluded.

MR. DERSHOWITZ: We have no objection to that, your Honor.

MR. SAGOR: May we have just a minute, your Honor?

(Pause.)

MR. SAGOR: We will play the tape right after

the proceedings terminate this afternoon.

May we have a brief moment to confer, your Honor?

THE COURT: Yes.

(Pause.)

MR. SAGOR: I do have a couple of questions.

RECROSS EXAMINATION

BY MR. SAGOR:

Q Do you have before you a transcript of this conversation that you just referred to?

A Yes, sir.

MR.SAGOR: May we mark this?

MR. JAFFE: It was deemed marked as Government's Exhibit 22.

THE COURT: I do not think it has been marked physically.

(Government's Exhibit 22 marked for identification.)

Q Would you direct your attention to the sixth page from the end where Mr. Dershowitz was asking you questions. I refer now to Government's Exhibit 22 for identification.

A The top of the page --

Q The middle of the paragraph where, in part, the Baron is saying, "I'll see that you get something my Goddam

self." Do you see that statement?

A The sixth page from the end?

Q I will point it out to you (indicating).

A I have it.

Q Do you see the statement: "I'll see you get something my Goddam self"?

He continues: "That's what you said" -- referring to you, Detective Leuci?

A Yes.

Q Turn to the very next page, the fifth page from the end.

A Yes.

Q Do you see where Leuci says: "The bills."

You see Baron say: "Goddam."

And Leuci: "I got the same thing."

Then the Baron talks about bills again.

A Yes.

Q Then is it fair to say that the reference to "bills" is a reference to the Baron, but he is in debt?

A Yes.

Q Tell us now what on the preceding page, page 6 from the end where the Baron says, "I'll see you get something," is that referring to a promise that you once gave the Baron about seeing that he would be given money in a

time of financial stress?

A Yes.

Q Is it referring to your giving the Baron drugs in any way?

A No.

MR. SAGOR: I have no further questions.

MR. DERSHOWITZ: I have no further questions.

THE COURT: You may step down.

(Witness excused.)

THE COURT: I take it then we are finished with this witness except insofar as you reserve the right --

MR. SAGOR: I have a suggestion. After we hear from other counsel in this case, we should stay in the court. Counsel has a recording device and we can sit here until the Court can be advised at the earliest hour when to start.

THE COURT: I will see counsel in the robing room.

(In the robing room.)

THE COURT: State your name for the record, please.

MR. FREEDMAN: Monroe H. Freedman.

THE COURT: Dean Freedman, some hours ago you indicated that you wished to be heard. That time has finally come.

MR. FREEDMAN: Thank you, your Honor.

I am here as an ACLU volunteer attorney to

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represent Mr. Dershowitz because we are concerned with the implications that he might be guilty of some impropriety in this case. I would like to make some observations about the merits of that issue.

THE COURT: I invite them.

MR. FREEDMAN: First, I would like to ask your Honor that we be informed of the substantive rule that would be the basis of any such charge against Mr. Dershowitz and, second, after we have received notice of such a rule if your Honor might be intending to proceed in that direction in view of the fact that the Supreme Court has indicated that an attorney is entitled to due process --

THE COURT: Let me indicate to you, preliminarily, I am not thinking of holding Professor Dershowitz in contempt I am thinking of referring this matter to the Bar Association for disciplinary investigation.

MR. FREEDMAN: I understand. That's a rather serious step to take. It would be easier for us to address that question before your Honor before it ever got to the Bar Association if we knew what rule of what code or what canons, or whatever it is, that Mr. Dershowitz is supposed to have violated.

THE COURT: Having been a member of the grievance committee for some three years many years ago

I am not aware of any instance in which any judge who has referred such a matter to any grievance committee has ever gone through the canons. It is for the staff of the committee on grievances and, ultimately, the committee on grievances itself to determine whether the conduct of counsel has violated any of those canons.

MR. FREEDMAN: I understand.

What I urge you to do is not to take that rather drastic step unless you have satisfied yourself on the basis of having given us an opportunity to address ourselves to it.

I have done some research on the issue, particularly with reference to ABA standards relating to the defense function and the code of professional responsibility; according to those authorities an attorney is required to press all legally available points, his client's desires in the matters are paramount, his professional opinion, his own professional opinion of the merits of the point that is raised is irrelevant, and the only test is, indeed, even if the rule that is argued for is "unwarranted under existing law" as long as it is supportable by a good faith argument the attorney is required to go forth.

THE COURT: What you say is undoubtedly true, but we are talking about a somewhat different situation.

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Let's not really discuss the facts at this point. I think for the present they are not what you are here to talk about. You are here to talk about, if I understand it correctly, certain facts. What then am I in a situation to do or what should I not do? I would think as an abstract matter, and not necessarily relating to this case, that as a general rule the public declaration attributing unethical conduct to another lawyer, be he a public official or not, assuming that to be baseless, might be conduct on which the committee on grievances would interest itself. That's what we are talking about.

MR. FREEDMAN: I don't think we can weigh that apart from such things as the professional standards and constitutional standards that a lawyer is required to abide by in representing a client. The test is, according to Anderz v. California, a Supreme Court decision in 1967, that the attorney is required to argue an issue unless it is wholly frivolous as long as it might arguably support the client's position.

Then, in the code of professional responsibility, specific notice is taken of the problem of state of mind as being what they call a particularly perplexing matter.

THE COURT: Let me interrupt you for a moment. I want to cast this thing in its perspective.

Let's assume that Professor Dershowitz has said -- and I am picking each word rather carefully -- that the United States Attorney deliberately -- and the last is the key word -- suppressed evidence in the Supreme Court.

We are not talking about negligence suppression. We are talking about deliberate suppression.

Now, let us assume that there is not the slightest evidence of the deliberate suppression. Just for the purpose of this discussion, would you say that such conduct is above discipline?

MR.FREEDMAN: I would say so on at least two grounds, although I have difficulty in the context of this case accepting a premise that to suggest deliberateness on the part of the government is wholly frivolous and beyond the good faith argument on Professor Dershowitz's part.

But the Supreme Court has held, for example, that the justices themselves as public officials are not above the most extreme degree of criticism. The Konigsberg case was one where the lawyer was charged that the members of the Supreme Court were part of the cold war machinery that was betraying America, and Konigsberg was denied membership in the bar because of that. The Justices of the Supreme Court said, "We are public officials just like

others and what he is doing is exercising his free speech rights in criticising public officials." I don't think a public prosecutor is above a Supreme Court Justice in that regard.

I think the standard must be, if criticism of a public official can be grounds for discipline, it must be wholly frivolous. It cannot be anything other than the constitutional standard of effective representation or standards set down by the Code.

In this very courthouse there was recently a charge of deliberate obstruction of justice against a former prosecutor, the Attorney General of the United States. The government or the lawyers who levied that charge failed to prove it. I am not aware of any suggestion that they be disciplined for that. It seems to me --

THE COURT: You see the difference wherein they presented evidence to a grand jury and the grand jury has found probable cause to believe that the crime has been committed and just some lawyer standing up in the courtroom and making this -- you surely see there is a difference?

MR. FREEDMAN: I see there is a difference, but I would not characterize Professor Dershowitz as some lawyer standing up in a courtroom and making wild allegations.

THE COURT: Because of the office that he holds

in the university he should be held to a higher standard and because of the situation in teaching young people to become lawyers. I really feel that he ought to be held to a higher standard than some fellow who has not the background and who is not constantly exposed to classes upon classes of our best young people.

MR. FREEDMAN: Whether we hold it at a higher or lower standard his obligation remains to represent his client vigorously.

THE COURT: There comes a point beyond which vigor is not acceptable.

MR. FREEDMAN: I would concur in that, but that standard, as it has been set down in the authorities that I have seen, is that he is not entitled to make arguments that are wholly frivolous. Arguments that are beyond fair argument, good faith argumentation -- I think on the facts of this case it would be impossible to make a finding that he has acted other than in good faith in presenting arguments that support his position.

THE COURT: I am going to invite you or him to recite to me anything in the record of this case that shows that the government -- and I keep emphasizing the word "deliberately" -- deliberately suppressed evidence in the Supreme Court of the United States. I invite you

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to do that.

MR. FREEDMAN: "Deliberate" is a term of art. As I heard the case just sitting here today, I was satisfied in my mind on the basis of what I heard that the government had made a conscious decision not to present evidence and not to permit the Supreme Court to know what any Supreme Court Justice sitting on this case would want to know and be entitled to know. That's my judgment having sat here.

The fact is that the word "deliberate" is a term of art. It does not mean necessarily wilful in the ordinary criminal sense as defined in this circuit, for example. This is a quote:

"Where the prosecutor's suppression is deliberate, by which we include not merely a considered decision to suppress, taken for the very purpose of obstructing but also a failure to disclose evidence whose high value to the defendants could not have escaped the prosecutor's attention" --

The only question, therefore, iswhether Professor Dershowitz was acting in good faith in drawing his inference from the facts that we heard this morning and other facts that are of record in this case despite the fact that you are the prosecutors might draw a different inference, but it is in the context of the rules set down by the Court of

Appeals that he made the allegation "deliberate," which is a term of art, and I think supported it, but at least made a colorable argument, a non-frivolous argument to that effect.

THE COURT: I will hear whatever else you want to say. I invite you to submit a brief, if you feel you want to, by next Monday.

This is not a matter that concerns the government. I am not interested in hearing the government. This is strictly a matter within the Court's jurisdiction.

Would somebody leave word at my chambers this evening as to whether or not we are going to go forward at 10 o'clock. It does not really make any difference. I will be here at 9.30.

MR. DERSHOWITZ: Would your Honor like to hear what my own state of mind was in regard to what I meant by "deliberate," and what I had in mind and what I think the government has proved?

THE COURT: Yes.

MR. DERSHOWITZ: I think this may have been one misunderstanding.

THE COURT: Let me saywhat I understood by what you said.

I understood you, by your use of the word "deliber-

gp13 A 1220

ate" -- and certainly any layman would understand your use of the word "deliberate" to be in substance: premeditated for an evil purpose suppressed evidence.

That's one of the two definitions in substance that the Dean just read. That is what I understood you to say in court.

I am perfectly happy to hear you say what you had in mind.

MR. DERSHOWITZ: In preface, you have to understand that right at the beginning of our memorandum of law we define "deliberate" to mean one of two definitions, that is, not merely considered decision to express taken for the very purpose of obstructing but failure to disclose evidence. That is what we set out as our definition in the memorandum of law.

My reference to "deliberate" was intended as a reference to that standard.

I think your Honor knows me well enough and has heard me often enough to know that on every occasion I have accepted the good faith representations of particular attorneys appearing in this court. I have always said that I do accept the good faith representations of Mr. Putzel, Mr. Jaffe, Mr. Sagor.

This has been a hotly contested one and there

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have been some matters where I personally believe the government has not the very high standards that are required of them in terms of disclosure.

I think your Honor should also recall that I did not volunteer the statement deliberately. The government objected to the line of testimony I was pursuing at which time I was obligated to make an offer of proof. I had no intention to characterize where I was going at that point. My intention at that point was simply to ask the questions and to try to elicit information, and then if the information bore it out make a reference in my written brief to what we had alleged in our earlier presentation.

THE COURT: Let me see if we can't cut through this.

Do I understand then when you used the word "deliberate," you were not using it in the sense of premeditated and evil but rather in the sense of failing to reveal something that you feel was sufficient of importance to be revealed? Is that correct?

MR. DERSHOWITZ: Yes.

Let me be candid and clear.

THE COURT: Yes.

MR. DERSHOWITZ: It was my own view at the time

that the government had made not an accidental but a deliberate decision. They had thought about it and decided not to turn over the Goe memorandum.

Your Honor and I disagree as to the significance of the Goe memorandum, and the government and I disagree.

It was my view that there was a decision to withhold the Goe memorandum at that point. It was not my belief that the decision was necessarily made for bad purpose. Certainly, reasonable people could disagree as to whether the government had an obligation to disclose it, but I did not think on the basis of the conversations I had had with people in the government that that was an accidental inadvertence. I had been told that the government knew about the Goe memorandum. It is possible that I was overexuberant about it.

I, as Mr. Sagor testified, was so excited when I had the Goe memorandum, that it seemed to me that it was the most critical point in this case. Here is the first piece of evidence that we had that the government had some knowledge in their files and I did tell Mr. Sagor, "That does it. That's the key."

It was with that state of mind that it occurred to me that this definition was met: failure to disclose evidence with high value to the defense and could not

have escaped the prosecutor's attention.

THE COURT: Read the first part of the definition.

MR. DERSHOWITZ: When the prosecutor's suppression is deliberate and includes not merely a considered decision to supress taken for the very purpose of obstructing --

THE COURT: Stop right there. I take it you have not accused the government of the first part of the definition?

MR. DERSHOWITZ: I did not intend to accuse the government of making a decision to suppress for the purpose of obstructing. No, I did not.

THE COURT: All right.

MR. DERSHOWITZ: It seems to me that I was very excited about that. Mr. Sagor and I --

MR. SAGOR: I will not make a statement as to what you told me personally. The Judge has precluded that. Don't take me as necessarily affirming --

MR. DERSHOWITZ: I repeatedly called Mr. Sagor. I repeatedly asked him, "What do you have? What have you turned up? Do you have anything about Leuci's crimes?"

I was interested in getting every bit of evidence. Then, when we find out there was a piece of evidence that

indicated some knowledge by the government pretrial, I was very excited about it. I may also have colored my view by the following:

I am an experienced Supreme Court practitioner, much more than in any other court. I know and I believed that our chances of getting a new trial were much better in the Supreme Court if we were able to get the information to them at this point than they would be if we went through the route of a hearing and a trial motion and denial of the hearing and appellate review. I know the Supreme Court on occasion will take a look at a case and say to itself, "My God, there is really injustice here," and simply in the exercise of their special power to do justice in Federal cases, to reverse and to remand. I was banking on that. I was hoping for that. That's why I was very upset professionally, and my client was very upset, when we learned several days after the Supreme Court had disposed of the case that there was this piece of information that had not been given to us. It seemed to us that it was our decision and not the government's decision whether to bring that piece of material to the Supreme Court. The Court may have agreed it was frivolous or not significant. What would the harm have been? At least then the Supreme Court would have had it and with full knowledge.

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That was my state of mind at the time. I did not intend, and I certainly did not intend, to accuse a particular person of anything. I know the high regard with which you hold the United States Attorney's office.

THE COURT: I think I should tell you that it is not because I was a member of the United States Attorney's staff itself but because the United States Attorneys in this district over the years -- and this one in particular I might say -- continuously have set high standards of professional integrity. Certainly my information goes back to 1953, and I know that having heard people talk about the United States Attorneys in this district. The office has a very long tradition of integrity, and I really must tell you I have not seen one iota of evidence in this situation of any improper conduct. I mean by that that it is perfectly apparent to me that when a man testified about three or four instances in which the amount of thievery was between $4000 and $6000 -- I have forgotten -- that another $50 was not going to tip the balance.

However, I really think that since the record is now clear as towhat you meant to impute to the United States Attorney, and the sense in which you used the word "deliberate," I don't think I will pursue the matter

any further.

MR. DERSHOWITZ: I appreciate that.

THE COURT: You know, gentlemen, we really live at a time when government officials of all kinds have come in to disrepute, some of them very deservedly, but I really think that to unjustly attack a public official who has not earned that certainly is not in accordance with the responsibilities owing by a member of the bar. Frankly, I understood your use of the word "deliberate" in a more vernacular sense than the language of the case you read.

As I say, since you have indicated the sense in which you used it, certainly, over the time I have known you, this and other matters, I accept your word.

The matter is closed.

(Time noted: 5.00 p.m.)

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UNITED STATES OF AMERICA

v

EDMUND ROSNER

July 16, 1974
9:30 a.m.

(Trial resumed)

MR. DERSHOWITZ: May it please the Court, I am terribly sorry to have asked for another session this morning. It was fully my intention yesterday to be home.

THE COURT: It certainly is no inconvenience, and I want you to make whater record you feel in court.

MR. DERSHOWITZ: We spent a considerable amount of time going over the tape we got yesterday, and what we would like to do this morning is call several witnesses, and perhaps stipulate--I think each witness will take a very brief period of time--

THE COURT: Please don't feel limited. The only way in which you are limited is when I caution you about repeating yourself. That is the only way you are limited, no other way.

MR. DERSHOWITZ: We would like to call Nicholas Scoppetta.

THE COURT: Didn't I understand Mr. Shaw was going to be called?

MR. SAGOR: I called him this morning. He has

absolutely no information about the transcript. I gave it to Mr. Dershowitz to call Mr. Shaw. He is on trial before Judge Cannella in the Brasco case, and he has witnesses. The first time available is at lunch. He knows absolutely nothing. I made it available for Mr. Dershowitz to call him.

THE COURT: Do you want Mr. Shaw?

MR. DERSHOWITZ: I would like to spend two minutes on the phone with him. I tried to call him this morning and I was unable to reach him.

THE COURT: He is trying a very important case.

MR. DERSHOWITZ: I am happy to accept his representation to me that he has no knowledge. If we can simply have a phone conversation at lunch, I am certainly, in light of Mr. Sagor's representation, I will not have to call him.

MR. SAGOR: Mr. Leuci is available. Commissioner Scoppetta I have asked to come here.

THE COURT: Is Commissioner Scoppetta here?

MR. SAGOR: Not yet. I told Mr. Dershowitz what Scoppetta said. He told me last night he would be willing to stipulate, Mr. Dershowitz, but apparently he is not willing to stipulate.

I would like to note my general objection to the general continuation of these proceedings and indicate what

truly happened, which Mr. Dershowitz has not seenfit to tell your Honor. At the end of the proceedings yesterday, we turned over to Mr. Dershowitz the copy of the tape. He then gave the copy to Mr. Rosner and another individual and left the courtroom. I at that time did not want to stay in the courtroom and listen to the tape. I gave special instructions to have the tape returned to me at 7:30 where I sat in my office, or if I was unavailable, to return the tape to the guard at the court house.

That was not done, your Honor. Mr. Jaffee came up to the courtroom at 7:30, found Mr. Rosner and an associate had departed the courthouse. I then went down to the guard downstairs, found that no tape was left for me, and departed at about 20 of 8 after calling Mr. Dershowitz at his brother's house and his mother's number, which he had left me. I was told at that timeMr. Dershowitz was unavailable, he would call me back. Last night at 9:00 o'clock in my house, Mr. Dershowitz called me and told me that according to Mr. Rosner and associate--he did not listen to the tape--would not tell me what differences allegedly appeared on the tape of the thing as opposed to the transcript, and asked that Shaw, Morvillo and Scoppetta be produced before this Court at 10:00 o'clock this morning, but would not tell me what changes, if any, he saw on the transcript.

Your Honor, my basic objection in an audibility hearing in federal cou[illegible] parties get together before. Last night I could have [illegible]d this all out as opposed to imposing on the Court's time this morning. The tape was taken--

THE COURT: I am going to tell you, this hearing was closed, except for any matter which comes about from listening to the tape. That's what I indicated yesterday afternoon.

MR. SAGOR: What's his offer of proof?

THE COURT: I don't know. I said before, I don't propose to have you retry the whole thing--

MR. DERSHOWITZ: We have no intention--

THE COURT: --or even recall all these very important public figures at home. You have had your turn.

MR. DERSHOWTIZ: The only questions we will ask them is about this tape, and really, only a very limited number of questions. Related to what Mr. Sagor said, he was fully informed--

THE COURT: Wait just a minute. I want to know one thing. Did that tape leave this building?

MR. SAGOR: Yes, with Mr. Rosner and an associate. I want to say it is a copy, not the original. I have the original. To the best of my knowledge there were no changes,

it was not given to anybody to be played, I want that representation from the defendant. That's part of the problem. Mr. Dershowitz left, it shouldn't have happened. I didn't say, it was not my desire to stay with Mr. Rosner and an associate in the courtroom.

MR. DERSHOWITZ: I informed them that Mr. Rosner and Mr. Dorfman was going to say and listen to the tape. That was entirely agreeable to Mr. Sagor. This is the first time I learned there was any agreement to return the tape to the marshals.

THE COURT: Was the tape removed from the building?

MR. DERSHOWITZ: Yes, I learned last night--

THE COURT: Do you think that's an acceptable practice?

MR. DERSHOWITZ: It was a copy of the tape.

THE COURT: I don't really care that it was a copy of the tape. Let me ask you this, is it any different when Mr. Haldeman takes a tape out of the White House, or any lawyer takes a tape out of the courtroom?

MR. DERSHOWITZ: Yes. I am honest and Mr. Haldeman is not.

THE COURT: That may or may not be true.

MR. DERSHOWITZ: The third difference is nobody

ever told me not to take the tape out of the courthouse.

THE COURT: Do you have to be told that? If you have to be told that, you have to confine your practice to the courthouse.

MR. DERSHOWITZ: We were not told--

THE COURT: Your client knows more about what you can and can't do. In ten years he'll know more about what you can and can't do in a trial court than you'll ever know.

MR. DERSHOWITZ: If there was any impropriety in removing the tape from the courthouse, I was not aware of it. The tape was not used to my knowledge, except in the courthouse. It was taken to the attorney's office where I first learned about it at about nine o'clock last night. I took personal possession of the tape at that point. I have had it in my personal possession ever since, and I assure you there was no problem whatsoever.

THE COURT: All right, let's put the witness on the stand. I have had enough of this.

MR. SAGOR: Your Honor, Detective Leuci is here. I brought him.

MR. DERSHOWITZ: Let me ask Detective Leuci three questions about his knowledge about the tape.

THE COURT: Get Detective Leuci.

MR. SAGOR: Is Mr. Rosner coming in this morning?

MR. DERSHOWITZ: I think he is. He was told this session is on 10 o'clock this morning. I only learned--

MR. SAGOR: Just before Detective Leuci enters, I would like to note--maybe Mr. Dershowitz would like to controvert it--that in his presence Mr. Rosner and Mr. Dershowitz were told to return the tape to the guard downstairs if in any event they couldn't reach me. In any event, I was in my office until I learned Mr. Rosner and an associate had departed from the courthouse.

MR. DERSHOWITZ: The first I hear of it is now. I tried to call Mr. Rosner from eight o'clock on.

THE COURT: You didn't take the tape out of here and the person who took the tape our of here knows perfectly--really, knows perfectly well that that is a totally unacceptable, to put it kindly, practice.

Now, that young man is absolutely and thoroughly experienced and, really, what he did is offensive.

MR. DERSHOWITZ: I am sorry, your Honor.

THE COURT: All right, askyour questions.

ROBERT LEUCI, resumed.

BY MR. DERSHOWITZ:

Q I have just a very few questions to ask you.

After you made this tape, I take it, you testified, at Mr. Scoppetta's recommendation?

A Yes.

Q And can you tell us what you physically did with the actual tape after it was completed?

A We had a procedure that we went through, and to the extent that when I made a recording myself, without backup agents, in other words, my car was rigged up in such a way that I could make my recordings myself without backup agents in my automobile, I would then run the tape to its conclusion, finish it on a reel, put the tape ina box, initial the box, or write something on the back of the box, the date and the time, and the person that I was taping the conversation with.

At that point in time at the first opportunity I would then turn it over to one of the back up ag[illegible]s.

Since I wasn't being covered on this incident, like many others, I waited until the next day to see Agent George Carros and turned the box over to Carros.

MR. DERSHOWITZ: [illegible] have the original of the tape? We'd like to mark it in evidence.

MR. SAGOR: May this be marked Government's Exhibit 22-A for identification.

Your Honor, while we are at it, the transcript

somehow is not here. I would like this remarked 22-A for identification. Maybe Mr. Dershowitz has it, I don't know. But in any event, may this be 22 for identification, and may the tape be 22-A for identification.

(Government's Exhibit 22 remarked, and Government's Exhibit 22-A marked for identification.)

MR. DERSHOWITZ: May I have the tape, please.

MR. SAGOR: Scotch tape the identification slip, Mr. Clerk, I suggest.

MR. DERSHOWITZ: Thank you.

Q Would you look at this box and at the tape inside and see if you can identify it as the original recording and original box?

A Okay, I can identify the box by my handwriting on the back of the box, and by the date on the box, my code name TPF-1 and Richard Lawrence, also known as "The Baron". Inside on the tape itself is the original, 329, which is a code number for the date, and JJB, which was John Buckley. I could identify that to be the original tape by Buckley's initials on the tape itself.

Q Can you tell us who John Buckley is?

A John Buckley is an agent assigned to the Southern District of New York.

Q And did he have any contact with this tape?

A John Buckley was the custodian of evidence during the investigation. All original tape recordings were turned over to his custody.

Q And you, however, personally turned this tape recording over to Mr. Carros?

A To the best of my recollection, I turned it over to Mr. Carros, that's correct.

Q Did you ever have any discussion with Mr. Carros about who else may have heard or knew about the existence of this tape?

A I don't recall. I had a conversation with Mr. Scoppetta about the tape because it was at his recommendation I made the recording.

Q Did you have any conversations with anyone other than Mr. Scoppetta and Mr. Carros about the tape, the fact that it was being made or the substance of what was contained therein?

MR. SAGOR: Conversation when; back in 1971?

THE COURT: Fix the time, please.

Q Around the time the tape was made, just before the tape was made, or within several months after the tape was made?

A No.

Q Just Mr. Scoppetta and Mr. Carros?

A Just Scoppetta and Carros. It was a small group we worked with. The people we were working with during the investigation knew that I had made that recording, I would assume, you know, I told them I had made that recording.

Q Did you tell Mr. Shaw that you made that recording?

A I may have. I would think that I did. I am not positive.

Q Did Mr. Scoppetta have a discussion with you relating to this recording?

A Yes.

Q And can you tell us what he said to you and what you said to him?

A Mr. Scoppetta asked me whether or not I felt from the conversation with the Baron, if the Baron had in fact been actively involved in the killing of that fellow up in the Bronx, and I told him, as far as I was concerned, from the recording, that they should give the Baron a lie detector test, and I couldn't tell, really, I couldn't tell whether he was telling me the truth or not.

Q Was there any discussion between you and Mr. Scoppetta about the remaining four-fifths, approximately, of the tape which did not deal with the alleged murder in the

Bronx?

A There was conversation basically about, you know, general conversation about what was on the tape, again it was at a time when I was acting as an undercover agent, and the conversations on the tape were conversations that I was having with the Baron in my capacity as an undercover agent.

Q Were there any conversations with you and Mr. Scoppetta about the very substantial part of the tape that deals with drug dealings engaged in by the Baron?

A I mentioned the fact that I had taken--I described it as an offhandish shot at Scotty Watson which I thought was unfair, and I was--sometimes I get carried away with myself--I described it that I took an offhanded shot at Scotty Watson. I thought that Scotty Watson and the Baron had illicit drug transactions, that was my feeling, that Scotty Watson and George Bermudas had been selling drugs, and I mentioned that to Scoppetta also that I had mentioned something on the tape having to do with Scotty Watson.

Q Did you ever ask that this tape be destroyed?

A That this tape be destroyed?

Q Yes.

A For what reason?

Q I asked, did you ever ask?

A Of course not.

Q Was the tape ever played back to you?

A The tape? I listened to the tape a couple of times after the Baron's allegations came in. I thought there were some things that were on the tape that could be helpful as far as I was concerned. I wanted to listen to those. At that time I listened to the tape.

Q Excuse me, let's get a time frame in that.

I assume you mean when the Baron's allegations came in in January of 1973?

MR. SAGOR: I object to Mr. Dershowitz's assumptions. The witness can answer the question as to when he heard the tape, or whether it was in '74.

THE COURT: When to the best of your recollection did you hear the tape?

THE WITNESS: It was in '74, it was at a time when the tape had not been transcribed, up until that time, and we transcribed--when the police people transcribed it--and then I listened to it and compared the transcription to the tape. I describe tapes as being finalized when they are as, you know, Sagor-ized, I mean, really, to the fine point of being finalized, and in fact this tape is not that that way, neither is this transcript. I haven't sat down and finalized that transcript the way it really should be,

I guess, but it was basically all the conversation that took place between myself and the Baron was on that transcript.

Q You did say at minute ago you thought you had heard this for the first time after the Baron's allegations came in.

I take it by that you mean the Baron's allegations contained in our most recent new trial motion and not the Baron's allegations that came in in January of 1973 that led to the Baron's being given a lie detector test?

A To answer your question correctly, after I made the recording itself, I sat down and listened to it, okay? And I discussed portions of that recording with Mr. Scoppetta, having to do with the shooting in the Bronx. I had then at some time thereafter listened to it again, and to the best of my recollection, it was several months ago, I think around the time that you are saying, around the time that affidavit, you know, the affidavit came in, around that time. I had made mention that there was solid evidence on that tape about the Baron and myself, as far as he asking me me for narcotics and I telling him I had never given him narcotics and him affirming that.

MR. SAGOR: Your Honor, may we know who Detective Leuci had that conversation with? He said that there was

solid evidence of the tape, etc. May we have Professor Dershowitz ask who the conversation was with?

MR. DERSHOWITZ: That's redirect.

MR. SAGOR: The usual way is to ask the witness whom he spoke to.

THE COURT: With whom were you having this conversation?

THE WITNESS: As I remember, I mentioned that to the Assistant United States Attorney Sagor.

Q Now, I just want to get very clear. In January of 1973, the Baron made certain allegations about you relating to drug dealers.

A Yes.

Q Do you recall that?

A Yes.

Q At that time did you mention the existence of this tape to anybody?

A I mentioned it, that there was a tape between myself and the Baron.

Q Whom did you tell that to?

A Bob Morvillo.

Q In 1973?

A Yes.

Q Did you then listen to the tape in 1973?

A No.

Q Do you know, to your knowledge, whether Mr. Morvillo listened to the tape in 1973?

A Not to my knowledge.

Q Did you ever have any discussion with Mr. Morvillo about the tape, other than to tebl him of its existence?

A I can remember the conversation was around the time the allegation came in, and when I mentioned the fact about having a cancelled check for one of the cars, I also said, "I have a recording with the Baron where we discussed narcotics or he asked me for narcotics and I told him I had never given him narcotics and he affirms that."

To that extent, he understood what was on the tape. That's what I told him.

Q But he never had a discussion with you reflecting

his listening to the tape, as far as you know?

A That's true.

Q Did you tell him where the tape was at that time?

A He didn't ask.

Q Did you know at that time where the tape was?

A Yes.

Q Can you tell me where the tape was at that time?

A To the best of my knowledge, the tape would be in a safe located on the fourth floor in the courthouse.

Q In the United States Attorney's office?

A Yes, sir.

Q To your knowledge, when you listened to the tape back around the time when it was made, did you listen to the tape in the presence of anyone else?

A I listened to that tape -- I played part of that tape, as I remember, for Mr. Scoppetta. I also listened to that tape by myself, I would think.

Q So it is your testimony that you played part of the tape for Mr. Scoppetta and you listened to the rest of it by yourself?

A I made over one hundred recordings during this investigation, and recordings that I made by myself, for the most part, most of the time I would listen to them to

see the quality of the recording, but I remember in this instance that I'm not positive if I played it for Scoppetta or not. I'm not, but, certainly, we spoke about the incident relating to the Bronx incident on the recording, and I think I may have played that part of the tape. I'm not sure.

MR. JAFFE: I want to inform the Court that Commissioner Scoppetta is here.

MR. DERSHOWITZ: This will be brief.

Q On the tape itself, you have said that the reason you wanted the tape to be played by Mr. Sagor is that it establishes your refusal repeatedly to give drugs to the Baron; is that correct?

A No. The reason that I wanted Mr. Sagor to listen to that tape was to get some kind of feeling for the Baron if, in fact, the Baron was going to take the stand.

The Baron has a lot of peculiar ways when you talk to him, and one of the things he does is, for example, he stutters when he lies, and it is something that he finds difficult in hiding. I say you can listen to that and understand the way he pressured me, and the way he was pressuring me for money and things like that.

Also, you have a conversation regarding narcotics on the recording, which is a good conversation for the

Government, for me.

Q That's one of the reasons you wanted this to be heard. This was a good conversation for you regarding narcotics?

A It was a good conversation as far as the investigation was concerned.

Q Was it a good conversation because the Baron asked you for drugs, and you refused to give it to him?

MR. SAGOR: Objection.

THE COURT: Why did you regard it as a good conversation?

THE WITNESS: I felt it was a good conversation because it showed the kind of pressure that detectives are put under that deal with these kind of informants all the time.

I said you can listen to this and understand the type of guy that the Baron is, and there's many other guys like him. The conversation is good in the sense of a lot of the allegations that he makes about me regarding his supposed narcotics dealings with me. We talk about that to some extend on the recording. That part is good as far as the motion is concerned.

It's also very good to have the opportunity to listen to someone prior to the time of cross-examining him.

That was my feeling about it.

Q At the time you made this recording, it is a fact, is it not, that you had given the Baron some drugs?

A I had given the Baron drugs on one occasion a long time prior to the time of the recording, and I had been present when the Baron had gotten the drugs another time, quite some time prior to the recording. I had never, hand-to-hand, given the Baron narcotics.

Q In your conversation with the Baron in which you suggest to him a way of obtaining drugs --

MR. SAGOR: May we have the page? I object to the characterization. We have the exhibit here. He now has a marked copy. We paginated the thing.

If he wants to show it for the detective's attention, I will hand up to the witness, if I may, 22 for identification. Each page is now numbered. We can proceed in the usual fashion.

MR.DERSHOWITZ: Unfortunately, my transcript is nto conformed, but it's Page 32 of the old numbering, which I think we can probably find.

MR. SAGOR: Prior Page 32 on the bottom. In your copy, you will see it on the upper left and then on the bottom.

MR. DERSHOWITZ: It's not 32.

THE WITNESS: There is another transcript in the witness room that has pages that are numbered.

MR. DERSHOWITZ: It's this page.

THE WITNESS: We'll get you a copy.

MR. SAGOR: In the upper left-hand corner, you will see Page 32. Here it is.

MR. DERSHOWITZ: Thank you.

That's not helpful. I would like to address Mr. Leuci's attention to this page.

THE COURT: Show him your copy.

MR. SAGOR: I went over it with Mr. Rosner's associate.

THE COURT: Please.

MR. SAGOR: Mr. Dershowitz is on Page 43.

Is that correct?

MR. DERSHOWITZ: Yes.

Q Addressing your attention to the dialogue I read into the record yesterday, did you understand --

MR. SAGOR: Where are you? Indicate that.

MR. DERSHOWITZ: Page 43. I am on the part that begins: "The easiest way for you to get a package is to make a case, right?"

I think Mr. Leuci understands what I'm referring to.

THE COURT: It's important that counsel know, too. Let's move ahead.

MR. SAGOR: Show me where it is.

MR. DERSHOWITZ: Here (indicating).

MR. SAGOR: Thank you.

Q At the time that you made the statements contained in the next several pages, suggesting to him a way of obtaining drugs for himself, did you realize that you were committing a felony?

MR. SAGOR: Objection. He was operating in his undercover capacity for the Knapp Commission in March 1971, with the understanding that a lawyer for the Knapp Commission may hear parts of this recording as he was operating as an undercover agent and was not committing a crime at the time.

THE COURT: Sustained.

Q Was it part of your job in making this tape recording, as instructions given to you by your superiors, to suggest to Mr. Lawrence ways of obtaining drugs for himself?

MR. SAGOR: Objection. He stated what his instructions were.

MR. DERSHOWITZ: I take it his instructions were that he was not to do that.

THE COURT: I sustain the objection on the ground it's very far afield from the issues of this hearing.

MR. DERSHOWITZ: It seems to me the critical issue is whether he committed crimes after 1971. He has repeatedly denied committing crimes after 1971. We feel this tape establishes a crime after 1971, unless he was specifically instructed by Mr. Scoppetta to suggest to the Baron ways of obtaining drugs for himself.

Indeed, one of the crimes is a crime that he admitted having committed to Mr. Jaffe in the Jaffe memorandum.

THE COURT: Proceed.

MR. SAGOR: May we know from Professor Dershowitz what his position is? He told me last night his claim was that this tape was 3500 material. Now he has another claim that this tape reflects crime on Detective Leuci. Can't he state for us where he's going so we can --

THE COURT: I would rather he put questions.

MR. DERSHOWITZ: Again, your Honor, I think we will probably have no more questions of this witness except, without making it an offer of proof, I would like to indicate that the direction of the question, the objection to which was sustained, was to establish that Mr. Leuci was not authorized to suggest methods to the

Baron of obtaining drugs for his own personal use, and that in fact the actions of Me. Leuci contained on these pages is a felony.

THE COURT: I understood that to have been your point.

MR. SAGOR: Two more questions on that, as the good Professor promised. He obviously is making some sort of record if the Government prevails, and he might as well take up another two minutes since he has done this this long a time.

I say that with great deference to the Court.

THE COURT: Haveyou just said you have no other questions?

MR. SAGOR: He said he had two more if he could establish his point here. If it's only two more, he might as well make them.

THE COURT: Do I understand you are acting in your capacity as a judge of the Court of Appeals for the Second Circuit? I have ruled.

MR. SAGOR: I have recross.

May I ask that Mr. Scoppetta be taken out of turn as a convenience to him and reserve --

THE COURT: Let's see how long you are going to be with Mr. Leuci.

RECROSS-EXAMINATION

BY MR. SAGOR:

Q At the time you made this transcript, did you understand yourself to be an undercover agent?

A Yes, sir.

Q At the time you made this tape, were you working for Mr. Scoppetta of the Knapp Commission?

A I was working for Mr. Scoppetta, yes, sir.

Q And Mr. Carros at that time was assigned to the Knapp Commission as an investigator?

A Yes.

Q When you had this conversation, directing your attention to January 1973, with Mr. Morvillo, did you indicate to Mr. Morvillo that the tape that you had of the conversation you had with the Baron controverted the allegation, as you understood it, as of January 1973?

A That's right.

Q Did there come a time after March '74 when you had a conversation with Mr. Giuliani concerning the tape, Government Exhibit 22-A for identification?

A Yes.

Q You also had this conversation with me, Assistant United States Attorney Sagor?

A Yes, sir.

Q In your conversation with Mr. Giuliani and Mr. Sagor, did you indicate how the tape recording that you had of the Baron controverted his allegation that you were involved with him in narcotics transactions --

MR. DERSHOWITZ: Objection. He's asking for conclusions.

THE COURT: Overruled.

A That's precisely what I told --

Q Is it fair to say that having looked at the transcript of this recording and having recently heard the recording, that the recording does, in your opinion, controvert the allegation of the Baron?

MR. DERSHOWITZ: Objection.

THE COURT: Sustained.

Q Is there any place on the recording that reflects any admissions of wrongdoing on your part?

MR. DERSHOWITZ: Objection.

THE COURT: Overruled.

A No.

Q Is it fair to say that you, in part, participated in the making of this transcript, Government's Exhibit 22 for identification?

A It's fair to say that I participated in the making of the transcript, but I did not finalize the transcript.

Q Is it also true that the reason that transcript was made was for anticipated cross-examination of Lawrence in these proceedings?

A Yes.

Q Did you tell Mr. Giuliani, for example, that the tape recording would be helpful in the cross-examination of the Baron?

A Yes.

Q You still believe that to be true?

A Yes.

MR. SAGOR: No further questions at this time.

REDIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q You have testified on cross-examination that there are no admissions of crime contained in these statements.

Are there admissions in the tape that you knew that the Baron was operating as a seller of drugs?

A I was acting as an undercover agent for the Federal Government, for the Knapp Commission. Certainly I say there are admissions that I knew that the -- he was telling me he was selling drugs, he was having a problem selling drugs. My conversation with a lot had to do with how he obtained these drugs, how he would go about obtaining

these drugs. I accused him over the years of using these various forms of getting narcotics and I also accused him over the years of getting narcotics from other detectives.

THE COURT: Let me understand you. I want this in the record in case some judges of the Court of Appeals have not had the experience you have in dealing with narcotics informers.

You were sent there in an undercover capacity; is that right?

THE WITNESS: Yes.

THE COURT: Your basic reason for going that night, or day, was to find out what you could about this murder in the Bronx; is that correct?

THE WITNESS: Yes.

THE COURT: In the course of your police work, you would not go up to somebody like this man and say, "Say, listen, fellow, did you shoot that guy in the Bronx?", would you?

THE WITNESS: That would be part of it, but along with that a long conversation.

THE COURT: You would first enter into a conversation to, what I would call rather unscientifically, "warm him up," or establish a relationship, wouldn't you?

THE WITNESS: Yes.

THE COURT: And the subject you discussed in that warm-up period would be whatever to you at the time would be likely to help in that respect, or whatever he raised with you?

THE WITNESS: Yes.

THE COURT: That would continue, in the ordinary course of police work, wouldn't it, unless and until you found that you had established, or thought you had established, a rapport with this man sufficient to come to the subject matter that you had come to talk about; isn't that correct?

THE WITNESS: Yes. But also, your Honor, I would approach all people differently. The Baron, I would come on strongly, very hard, in the very beginning, and then go off to another conversation having to do with his narcotic problems and things like that, and come back to that.

It was a running conversation to relax him and the kind of conversation you have with people who are targets of investigation.

THE COURT: Over many years of law enforcement, as a police officer, or even as a prosecutor, one develops techniques in dealing with cooperative people; isn't that

correct?

THE WITNESS: Yes.

THE COURT: And very often they differ in one case from another; isn't that right?

THE WITNESS: As people differ.

THE COURT: In this particular case, as I understood it -- correct me if I am wrong -- you were not there to talk to him about your previous relationship with respect to narcotics; that was not your basic reason for being there.

THE WITNESS: No.

THE COURT: You were there to talk to him about this killing in the Bronx?

THE WITNESS: Yes.

THE COURT: Go ahead.

Q But, in fact, in this particular set of questions, you didn't pursue that at all. What you did, as a matter of fact, was to ask him immediately and directly whether he committed the murder in the Bronx, and then went on to a long discussion of narcotics and never returned to the murder.

Is that not a correct characterization of the tape?

A No.

Q Give us a characterization of the chronology, the sequence, of the various subjects covered on the tape, briefly.

A As I recall, we start off, I come on strongly at the very beginning about the murder in the Bronx. And then we revert back to his financial problems.

And then I go back to the situation in the Bronx, telling him, "How are you going to handle the lie detector test when you have to get that when you are forced to take one?"

We then talked about Scotty Watson. The reason I talked about Scotty Watson to him is because Detective Watson was in the car with him when this murder took place.

And I'm sorry if I am characterizing this as a murder -- in many people's opinion was a murder -- it turns out in fact someone was arrested in that case, so actually there may not have been a murder. But certainly many people in law enforcement believe it was a murder.

But the conversation had to do with Scotty Watson, his relationship with the Baron and my relationship with the Baron, and I tried to intertwine both relationships and I tried to find out if Scotty Watson had in fact committed the murder or the Baron had committed the murder.

So it's an ongoing conversation.

Q But the Judge asked you whether or not you went to conduct this interview and you conducted this interview in your capacity as an undercover agent.

Is it not true in reading the interview that you conducted this interview in two capacities, (1) as an undercover agent who had had undercover dealings with the Baron, and (2) as a long time, pardon the expression, criminal, who had had criminal dealings with the Baron as well, and you were in fact trying to discuss with him and get him to make statements self-serving to you concerning his past criminal relationships with you?

MR. JAFFEE: Object to the form of that question.

THE COURT: Sustained.

Q Did you not in fact feel that your conversation with him also involved past criminal dealings between you and the Baron?

A Absolutely not. Because my conversation with him was, you know, when it came to criminal dealings that he had had in the past, I knew I had no criminal dealings with the Baron as far as I was concerned with his criminal dealings as a narcotics detective. I had not sold the Baron narcotics, okay? Now, Scotty Watson I believe had sold the Baron narcotics. And so I tried to compare myself to Scotty Watson and--during thatconversation--so a lot of that

came out.

Q But it is your testimony that at that time you felt that the giving of drugs to the Baron, which you admitted having done, did not constitute a crime?

A Okay, in the true, pure sense of the word, it constituted a serious felony, it also constituted a serious felony giving a bag of narcotics to an informant. But as far as I was concerned, where my head was then, I had not committed any serious crimes by giving narcotics to an informant.

Q But it is your testimony that at the point you made this tape, you were not concerned about charges that the Baron could make against you?

A No, it was absolutely positive--at that time I at no time thought that the Baron would ever make any charges against me.

Q Did you not say at the end of the interview after the Baron closed the door of the car and left, "Slickest nigger that ever lived. Put me in jail? No way he is going to put me in jail."

A No, I didn't say that.

Q Would you look at page 64.

A I said something similar to that, and I said it in laughing as he left the car, after making some kind of a

statement to me. I remember what I said. And I can tell you exactly what I said.

THE COURT: What did you say?

THE WITNESS: I said, "That's the slickest nigger that ever lived. If anybody is going to put me in jail that guy would."

Q Thank you.

This tape does reflect the fact, does it not, that for years you knew the Baron was dealing in drugs and that you never reported that to your superiors; is that correct?

MR. SAGOR: Objection, your Honor.

THE COURT: Sustained. The tape speaks for itself. Sustained.

Q Did you ever report to your superiors up until the point that this tape was made, the fact that you knew that the Baron was dealing in drugs?

MR. SAGOR: Objection, your Honor.

THE COURT: I will permit that.

A Official report to my superiors?

Q Yes.

A No, sir.

Q I mean a report within your authorized authority as a police person, was any such report made?

A No, sir.

MR. DERSHOWITZ: No further questions.

THE COURT: Do you have four or five more that will trigger another 20 or 30 more? Go ahead.

MR. SAGOR: No, I don't, but I would like to have this witness temporarily excused, and I do have a very brief application of the Court based upon a phone call.

I have no further questions.

THE COURT: Step down.

(The witness was excused.)

MR. DERSHOWITZ: I would like to call Mr. Scoppett.

THE COURT: Just a moment. I want to take this sentence next.

MR. SAGOR: That would be my request, your Honor. Mr. Morvillo is in Monticello, New York. He is standing by, by the telephone. Perhaps if Mr. Dershowitz could speak to him on the phone--

THE COURT: Speak to him.

Call the sentence.

MR. SAGOR: Could we use the robing room, your Honor?

THE COURT: Yes.

(Recess)

EDWARD MICHAEL SHAW, recalled as a witness by the defendant, having been previously sworn, testified as follows:

THE CLERK: Mr. Shaw, you are still under oath.

DIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q In March of 1971, the tape recording was made by Robert Leuci of conversations involving himself and the Baron involving a murder in the Whitestone Bridge area in the Bronx and involving some discussion of narcotics. When did you first become aware of the existence of such a tape?

A Mr. Sagor called me last night and asked me what I recalled about it, and I can say, with complete honesty, that as of his asking me about it and even after your brief talk with me outside here now, I have no memory whatsoever of ever knowing about the tape.

You say the date was March 29, 1971. I have got it right in front of me (indicating); this is called Government Exhibit 22 for identification. That's the tape?

Q That's the transcript.

A I asked you outside a moment ago whether it is crystal clear as of March 29 Leuci was already working in the United States Attorney's office, and I think my memory would be that that's accurate and you confirmed matters.

Q To my recollection that's true.

MR. SAGOR: I am not sure that's accurate.

As of March Leuci was not here. Scoppetta was not an Assistant United States Attorney until sometime in late June, 1971.

THE COURT: We will get that out.

A (Continuing) That's significant to me.

My point, Mr. Dershowitz, is that once Robert Leuci was working with federal investigators out of the United States Attorney's office, so to speak, I was certainly aware on a day-to-day basis of most, if not all, of the missions that he was on. I am sure I never heard any such tape recording. I am positive of that. I am sure I never saw a transcript until I saw something in front of me now. It is certainly possible that it was mentioned to me that Leuci was going to be speaking with the Baron on some particular mission. I don't have any memory of it whatsoever.

Q Is it true, as Mr. Morvillo has stated to us, that you and Mr. Scoppetta had prime responsibility for determining what constituted 3500 material out of the variety of tapes that were made by Robert Leuci?

A Your questioning incorporates something you say Mr. Morvillo said. I have no idea what he said.

Q Accept for the moment that Mr. Morvillo said that;

would that be a true statement?

A The only answer I can give you is that I left the United States Attorney's office before the filing of any indictments and, as you know, 3500 has to do with turning over material in the specific context of specific trials. I am sure that I never focused on any particular documents or tapes, or whatever, during the course of the investigation as 3500 material.

On the other hand, it is obviously true that we had set up some kind of procedure for record keeping, and it was certainly my understanding as chief of that unit that records were being maintained. If that's an answer to your question -- that's the best I can do.

MR. DERSHOWITZ: No further questions.

CROSS-EXAMINATION

BY MR. SAGOR:

Q Did you ever have any reason to believe that on any of the tapes that Mr. Leuci made for the Knapp Commission, or as an undercover agent, there were any admissions of misconduct on any of those tapes?

A I did not, with the exception of some things I was asked about the last time I was here relating to some tapes he made with Scoppetta before he came to the United States Attorney's office.

Q He was not an undercover agent at that time, was he?

A Certainly not for the United States Attorney's office.

REDIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q One more question --

THE COURT: For the benefit of those people who are inexperienced in the practice of law and who have been sitting in the courtroom, I want to tell you one of my own theories as a trial lawyer, and that is when the other side has not hurt you, don't stand up and ask a question that just opens the door to another branch. Learn to have the great courage and good judgment to say, "No questions."

Go ahead, Professor.

BY MR. DERSHOWITZ:

Q Did you do a sufficiently thorough investigation of tapes to be able to determine there were no admissions of misconduct by Leuci pertaining to the tapes?

MR. SAGOR: The question was "to his knowledge." This is not proper redirect, your Honor. I object.

THE COURT: Overruled.

A I at no time personally made any review of what was on the tapes, Mr. Dershowitz.

MR. DERSHOWITZ: No further questions.

THE COURT: Mr. Sagor?

MR. SAGOR: No, your Honor.

THE COURT: The witness is excused.

(Witness excused.)

MR. DERSHOWITZ: We would like to call Mr. Scoppetta.

While he is coming in, we make a request of the government that they turn over what Mr. Sagor has described as logs or records which may include reference to these tapes kept in the office of the United States Attorney.

MR. SAGOR: I object to any log of over 100 tapes that Mr. Leuci has had with targets of an investigation.

I indicated to Mr. Dershowitz when he sought to interview me yesterday, because he threatened to call your Honor's chambers, to settle any rangle -- he asked me whether I knew about the tapes prior to trial. I said I did not. I may have scanned a log where it was indicated that Lawrence was interviewed. It did not register on me.

There is a list of all targets of investigation, targets that Mr. Leuci made recordings with. There is a log of what tapes Leuci has made. That's obvious. One would understand that.

MR. DERSHOWITZ: I'm not interested in the other

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material. All I am interested in is finding out whether there was a record in the files of Mr. Sagor and Mr. Morvillo, the two chief prosecuting attorneys, which contained a reference to the log. That's obviously part of a case involving negligent --

THE COURT: A log of what?

MR. DERSHOWITZ: Whether or not there existed in the active files of the United States Attorney's office a reference to a conversation on tape between Leuci and the Baron. It seems to me that would be relevant to establish a negligence if the government had reference to these tapes and did not pursue that.

Is the government ready to stipulate?

MR. SAGOR: Absolutely not. I will state that I have no knowledge --

THE COURT: I want to tell you that when this part of the hearing is over this hearing is over. We will not have any more testimony,and that's the way it is.

I sustain the government's position.

Let's get Mr. Scoppetta.

N I C H O L A S S C O P P E T T A, recalled as a witness called by the defendant having been previously duly sworn testifies as follows:

THE CLERK: You are still under oath.

DIRECT EXAMINATION

BY MR. DERSHOWITZ:

Q I am sorry to call you away from your busy schedule, Commissioner. I have a few questions to ask you.

Did there come a time about March of 1971 when you authorized Mr. Leuci to make a tape recording of conversations between himself and Richard Lawrence?

A I'm not certain of the date, but early in the investigation there was a meeting between Leuci and Lawrence that was recorded.

THE COURT: Under whose auspices was that, Commissioner?

THE WITNESS: I was still with the Knapp Commission at that time.

Q When the tape was made, did you receive a copy of it?

A Myself or the agents would have received a copy, yes.

Q Do you recall having listened to the tape?

A Well, I think I listened to at least one portion of it.

Shall I go on?

Q Please.

A The purpose of the meeting was for Leuci to see if

he could speak to Lawrence about an allegation that Lawrence had been involved in a homicide in the Bronx. What I remember about the tape is a kind of unusual kind of denial, it seemed to me at the time, by Lawrence, where Leuci asked him about his involvement in this kidnapping investigation in the Bronx in which a man had been killed and another man had been shot. We had had that investigation before at the Knapp Commission and the Bronx DA's office had it at the time as well, and I remember Lawrence, when Leuci asked him about it, sort of saying, almost in a joking way, "No, no, no, Bobby," something ofthat sort. That struck me as very strange that that was his response. It didn't seem to me to be an anticipated response of a man being asked if he had been involved in a murder. I remember hearing that, or Leuci imitating Lawrence and saying that that is what he said. So I assume now that what I did was when Leuci told me that the Baron, Lawrence, denied involvement in the homicide and told me how he did it, I think what I did was hear that portion relating to the homicide.

Q Do you recall whether the discussion of the homicide was in one select portion or whether it jumped through the tape?

A I don't know. What I remember is Lawrence's denial where he says, "No, no, no," sort of in a laughing

way, I think. It is almost sort of a caricature of a black person responding to that kind of thing.

Q If it is true that the discussion of the homicide ran through the whole tape, would you, in your normal course of practice, listen to the entire tape or listen to the excerpts relating to the homicide?

MR. SAGOR: Objection.

THE COURT: He is asking for practice. I will allow it.

A As near as I can recall, what happened was that Leuci told me what Lawrence had denied involvement in the homicide, and I remember that kind of denial. That's what I remember about that tape.

Q Do you recall actually, as you sit here today, listening to any part of the tape?

A I'm not sure whether Leuci imitated Lawrence to me and I heard it, or whether he just imitated it to me. I think that I would have heard it because of the strangeness of that kind of denial in order that I will hear for myself what was Lawrence's attitude in tone when he was being asked about the murder, whether we still considered him a suspect or whether he denied it in a normal rational way.

Q I think it was Mr. Leuci's testimony here today that he probably also discussed with you some aspects of the

drug discussions that he had with the Baron. Would that conform to your recollection?

A I don't recall. It is possible. I knew the Baron had been an informant of his. I knew he had conversations with him about the cases, and so forth. He could have very well have told me something about conversations with Lawrence.

Q How did the tape ultimately get into the possession, to your knowledge, of the United States Attorney's office since it was made under the auspices of the Knapp Commission?

A I think -- my recollection is that we kept all the tapes in an office in the same building as the Knapp Commission, but apart from the Knapp Commission offices where the other attorneys were, one floor below, and we kept them under lock and key; I believe that when we moved out of those offices, when I moved to the United States Attorney's office and the agents moved to the quarters that was supplied by the Bureau of Narcotics and Dangerous Drugs, we just moved the tapes too, locked cabinets in the United States Attorney's office at the time.

Q When you came over and became an Assistant United States Attorney, you did at that point have control of the tape made of Robert Leuci and the Baron; is that correct?

A I would certainly have had access to it, sure.

Q At that point in time, again, let me preface this question, Mr. Morvillo has stated to us that you and Mr. Shaw were primarily responsible for gathering 3500 material in the Rosner case; is that an accurate description?

A We were primarily responsible for the investigation that led to the indictment, and in that respect I suppose we would.

Q Was it part of your responsibility to cull through the various tapes made by Robert Leuci to determine whether they contained 3500 material?

MR. SAGOR: Objection. What basis is there to believe that one would go through tapes made by an undercover agent looking for 3500 material where the targets of the investigation did not concern Edmund Rosner? There is no foundation for that question.

THE COURT: I will permit it.

A I don't think so. I didn't. To this date I have not heard all the tapes in the Leuci investigation. We had a team of police officers who were charged with the responsibility of making transcripts from the tapes. I think there must have been several hundred tapes, to my recollection.

Q Were you present at an interview conducted by Mr. Krieger with Mr. Leuci just prior to the Rosner trial?

A I was interviewed by Mr. Krieger. I don't recall

that Leuci was there. I think Morvillo was there.

Q You don't recall being present at an interview conducted by Mr. Krieger of Mr. Leuci where Mr. Leuci tried to replicate the crimes that he had stated to you on the tape?

MR. SAGOR: What does "replicate" mean?

THE COURT: I don't know what it means either. What does "replicate" mean?

MR. DERSHOWITZ: In which there was an attempt to describe what statements there were on the destroyed tape.

MR. SAGOR: I object. Scoppetta is being called back on a destroyed tape? I thought we were here for --

MR. DERSHOWITZ: It is limited to the fact that Mr. Scoppetta was present at a time when Leuci discussed the total number of crimes that he had committed.

MR. SAGOR: I object. This tape has nothing to do, as far as I see it, with any crimes that Leuci has committed.

MR. DERSHOWITZ: That's our point, and it is a point we tried to make on the record. It contains admissions of other crimes.

THE COURT: Like what?

MR. DERSHOWITZ: Like conspiracy to engage in the sale of drugs. Like -- I think we will develop this with this witness in a moment. It contains admissions of several very

felonies.

THE COURT: Go ahead.

A I don't think I was present when Mr. Krieger interviewed Detective Leuci. I know that Mr. Krieger interviewed me, and my recollection is that Bob Morvillo was there. Maybe Mr. Sagor was there. He was involved in the preparation of the case. It happened in the United States Attorney's office. That's my best recollection.

Q And in that interview, did you tell Mr. Krieger, to your best knowledge, all the crimes that you knew that Mr. Leuci had committed?

A As I testified to before, I told him, with the exception of the fact that I have since seen a memorandum written by a BNDD agent that recalls this incident of the money being passed and, as I say, I don't recall now whether Leuci said he got money then or not, but that he was talking about possible corruption on the part of a federal agent at the time. We had no conversation about that. I don't recall it at the time. I told Mr. Krieger in my conversation with Leuci, my conversation in the first few days of my meeting Leuci.

Q You did not tell Mr. Krieger about the existence of this tape?

A Lawrence?

MR. SAGOR: Objection.

THE COURT: You may answer.

A No. We had no discussion about the Lawrence tape.

Q When you sent Mr. Leuci out to make the tape, did you authorize him to suggest to the Baron various ways of obtaining drugs for his own personal, private, use?

MR. SAGOR: Objection, your Honor. The question can be asked whether Leuci was authorized as an undercover agent --

THE COURT: Read the question.

(Record read.)

A For Leuci's use?

Q For Baron's use.

MR. SAGOR: I object to that question.

THE COURT: Sustained.

MR. DERSHOWITZ: Mr. Sagor objected to Leuci being asked that question on the ground Mr. Scoppetta could be asked that question.

THE COURT: You are right. Go ahead and answer it.

A The purpose of meeting with Lawrence was for Leuci to explore with him his involvement in a shooting in the Bronx in which lawrence had allegedly been an informant for the police department. There had been an allegation made to us at the Knapp Commission that Lawrence had actually done the

shooting and had killed somebody in that car. Leuci was meeting with Lawrence to discuss that with him, and he knew Lawrence and had this prior relationship with him as an informant, and I think, in that situation we pretty much left it up to him as to how he would guide the conversation about the homicide. That's what I remember about the purpose of the meeting.

Q I take it it is your testimony you did not authorize him, specifically authorize him, to suggestto the Baron the ways of obtaining drugs for the Baron's personal use?

MR. SAGOR: I object.

THE COURT: Sustained. He has answered the question.

Q Did Robert Leuci ever tell you that he knew that the Baron was engaged in selling drugs?

A No. I don't think so. I knew that Lawrence was an informant of his and you can speculate as to the involvement an informant may have, how he knows about these things, but I don't recall that he specifically said that Lawrence ever specifically referred to a particular instance where Lawrence sold drugs. He certainly had access to people who were selling drugs and was giving information to the police department, I knew, and to the federal government.

Q Did Leuci ever tell you he was receiving money

from the Baron not to arrest him for the sale of drugs?

A No.

MR. SAGOR: Objection.

THE COURT: He has answered it. We are not going back over that whole thing. I can tell you that now.

Q It was not part of your instructions to Leuci to accept money from the Baron not to arrest him for the sale of drugs?

MR. SAGOR: Objection. It is perfectly consistent.

THE COURT: Sustained.

MR. DERSHOWITZ: Your Honor, we would like to make an offer of proof at this point.

THE COURT: No. Put a question, please.

MR. DERSHOWITZ: We have no further questions, but we would like to make an offer of proof that if asked, this witness would testify that he did not authorize Robert Leuci to pay money to the Baron to fail to arrest him for the sale of drugs; further, he did not authorize Robert Leuci to suggest methods by which the Baron could personally obtain drugs; further, that he did not authorize Robert Leuci to fail to report back his knowledge that the Baron was actively engaged in the sale of drugs.

I have no further questions of the witness.

MR. SAGOR: I will try again. I understand your

Honor.

THE COURT: I didn't expect that anything I might say would influence you.

Go ahead.

MR. SAGOR: It is Mr. Dershowitz' influence rubbing off.

THE COURT: Perhaps you ought to do something about that.

MR. SAGOR: I will try with two questions.

CROSS-EXAMINATION BY

MR. SAGOR:

Q Mr. Scoppetta, is it fair to say that Lawrence was a target of your investigation?

A That's true.

Q Is it fair to say that Detective Leuci was authorized to obtain incriminating evidence against Richard Lawrence.

A That's true.

MR. SAGOR: No further questions.

MR. DERSHOWITZ: I want to make one correction in my offer of proof, your Honor. I may have said Leuci paid the Baron. I meant to say that the Baron paid Leuci.

I have no further questions.

THE COURT: You may step down.

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(Witness excused.)

MR. SAGOR: There is a stipulation that I will read, but it should be understood that it is the defendant's stipulation.

Mr. Morvillo, if called by the defense, will testify as follows:

1. That he did not know about the Government Exhibit 22A prior to the trial in the Rosner case -- but Mr. Morvillo will check that.

2. That he learned about the existence of the tape, Government Exhibit 22A, in about January of 1973 from Detective Leuci.

A. That he did not listen to Government Exhibit 22A, which tape was in the United States Attorney's office at the time.

B. Nor did he see a transcript. No transcript was in existence.

C. Mr. Morvillo further does not recall whether he asked Mr. Sherman to listen to such tape recordings.

D. Mr. Morvillo was told by Leuci that the tape, Government Exhibit 22A inculpated the Baron with regard to narcotics transactions and exeronerated Leuci with respect to the Barron's allegations against Leuci of Leuci's involvement in narcotics transactions.

Mr. Morvillo further will testify that Mr. Ben Veniste may have known of the existence of the tape; that Richard Davis may have known of the existence of the tape; and that others may have listened to the tape and told him about it, but with respect to that last statement, that is subject to check.

3. Mr. Morvillo will further testify that he relied on Assistant United States Attorney Shaw and Assistant United States Attorney Scoppetta to determine the 3500 material and tapes applicable to the Rosner case, and, in part, Assistant United States Attorney Sagor.

MR. DERSHOWITZ: It is so stipulated.

We have a further matter. Maybe we can stipulate to this.

In the conversation with Mr. Morvillo I first learned that Mr. Sagor brought these tapes to the attention of Mr. Morvillo at about the time Mr. Morvillo was asked to file an affidavit in this case.

THE COURT: In this motion?

MR. DERSHOWITZ: In this motion.

And that it is Mr. Sagor's understanding that it was Mr. Morvillo's reference in his affidavit to other matters which inclined the government not to believe the Baron was a reference to this tape, and if we can stipulate

to that, that would be fine, otherwise I would like to ask Mr. Sagor on the witness stand whether that is, in fact, true and to establish that he did not turn over the tape at the time it first came to his knowledge even though he showed it to the government agents but bearing affidavits for the new trial motion.

MR. SAGOR: I am not going to stipulate to that, but I think we can reach a stipulation if I can have a moment to look at the record. I think we can reach a quick stipulation.

MR. DERSHOWITZ: If it has not been done we would like to offer the tape and transcript in evidence.

MR. SAGOR: I understood the whole basis for this was that the government transcript differed in part from the defendant's version. I object to it. This is appropriate cross-examination material of the Baron. It reflects controverted statements to what the Baron has in his affidavit and no wise represents -- unless Mr. Dershowitz can point to it, and even if he does point to it there are ambiguities. As to the ambiguities, if he has a witness on the stand to explain those ambiguities it still would not in any way undercut Detective Leuci.

MR. SAGOR: Your Honor, the government, pursuant to Mr. Dershowitz's request would be agreeable to stipulate that with respect to an affidavit of Robert Morvillo, which was Exhibit G in the Government's affidavit of April 9, 1974, with respect to paragraph 4 therein, the sentence in part: This decision was premised in part on the polygraph, in part upon the assessment of Mr. Lawrence's credibility, in part upon his constant demands for substantial amounts of money, in part upon our inability to corroborate and 'other factors', that Government's Exhibit 22 has reference to Mr. Morvillo's statement to "other factors"--in other words, in part, some of those other factors consisted of the tape, Government's Exhibit 22-A and the government would so stipulate to that.

MR. DERSHOWITZ: We accept that stipulation.

THE COURT: All right. Is there anything else?

MR. DERSHOWITZ: In light of your Honor's firm and unequivocal statement about this being the close of the hearing--

THE COURT: Unless you have other witnesses to call or other evidence to introduce.

MR. DERSHOWITZ: I would like to take one minute to consult with my client before we make this--

THE COURT: You know, Professor, these things must have an ending.

MR. DERSHOWITZ: I think we ought to explain that we certainly didn't have any expectation of this tape being produced yesterday.

THE COURT: I understand that. I was a little surprised to hear Mr. Leuci volunteer that in the first place.

MR. JAFFE: Your Honor, I just want the record to be clear that the Court has not in any way limited Mr. Rosner's or his attorney Mr. Dershowitz's attempts to put any evidence before the Court; that the Court has held the hearing to be open and allowed witnesses to be called at any time by the defendant so that there is no implication, and I want the record to be crystal clear, that the defendant has not been curtailed in any way from presenting evidence to this Court.

THE COURT: You mean after this. (Laughter)

MR. JAFFE: Up to this point, that the Court has made every attempt--

MR. SAGOR: I don't see any need for Mr. Jaffe to say it.

MR. DERSHOWITZ: I wish Mr. Jaffe hadn't made that statement, because it does require a response. Actually, we do not accept a characterization which does include the fact we have made efforts to introduce certain kinds of evidence by this Court's rulings which are the proper subject

of question on appeal.

Subject to that--

THE COURT:: Mr. Glekel, is there anything you would like to say? You haven't said a thing for quite a while.

MR. GLEKEL: I have nothing to add.

(Government's Exhibits 22 and 22-A received in evidence.)

MR. DERSHOWITZ: Your Honor, subject to new information becoming available, we have no further witnesses to call at this point.

THE COURT: Do you?

MR. SAGOR: No, your Honor.

THE COURT: Decision reserved.

MR. DERSHOWITZ: We would like to have an opportunity to submit a brief by a week from Friday.

THE COURT: Yes, I would like the brief by Monday.

MR. DERSHOWITZ: Could it be Tuesday?

THE COURT: Yes, Tuesday. I would like your brief by the following Monday.

MR. SAGOR: Yes, your Honor.

THE COURT: Decision reserved.

WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
Robert Leuci (Resumed)			944 964	962
Edward Michael Shaw	973	975	976	
Nicholas Scoppetta	979	989		

EXHIBIT INDEX

Government	Identification	In Evidence
22		995
22-A		995

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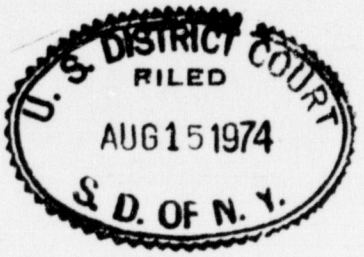

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

-against-

EDMUND A. ROSNER,

Defendant.

----------x

OPINION

72 Cr. 782

#41093

BAUMAN, D. J.

For the third time Edmund Rosner has moved for a new trial based on newly discovered evidence. He was convicted before me on December 5, 1972, of conspiracy, obstruction of justice, and of three counts of bribery.[1] This conviction was affirmed by our Court of Appeals, United States v. Rosner, 485 F.2d 1213 (2nd Cir. 1973), and the Supreme Court has recently denied certiorari ____ U.S. ____ (June 10, 1974) without prejudice to this court's consideration of the instant motion.

When originally filed, defendant's motion relied principally on the allegations of one Richard Lawrence, a registered government informant, that Robert Leuci had committed perjury at the Rosner trial by failing to disclose extensive criminal activity. For those whose memory of Life magazine has already dimmed it will be recalled that Leuci was and is a detective in the New York City police department who, at the time of the events described in the indictment,[2] was posing as a corrupt policeman in furtherance of

various investigations then being conducted by the United States Attorney's Office. Approximately one month after this motion was filed, on April 17, 1974, Leuci first revealed to members of the United States Attorney's Offices for the Southern and Eastern Districts of New York that his past criminal activities had been far more extensive than he had previously acknowledged, and that he had indeed committed perjury at the Rosner trial in this respect. 3/ Because the motion was made during the pendency of defendant's petition for certiorari, the holding of a hearing was deferred until after the Supreme Court had disposed of the petition. A hearing then commenced on July 1, 1974 and, after a week's interruption, concluded on July 16. What follows constitutes my findings of fact and conclusions of law.

A thorough exposition of the evidence developed at the trial can be found in the opinion of the Court of Appeals at pp. 1215-1219, and I shall set forth here no more than is necessary to give context to the discussion that follows. During October, 1971, Rosner was under indictment in this district along with Nicholas DeStefano in 70 Cr. 1030. 4/ Leuci, acting in an undercover capacity, approached DeStefano and Nicholas Lamattina and offered, through a supposed contact in the United States Attorney's Office, to provide information about that case as well as others then pending in this district. Rosner was later brought into the negotiations and ultimately participated in the payment of several thousand dollars to Leuci in exchange for grand jury minutes and statements of prospective government witnesses ("3500 material") in 70 Cr.

1030. There were five separate payments, over a period of three weeks, each of which formed the basis of a bribery charge. Rosner was acquitted of two of these charges, describing payments which took place on October 4 and October 8, and convicted of three others, which involved payments occurring on October 12, 13, and 19. He was also convicted of conspiracy and obstruction of justice. The essence of Rosner's defense was entrapment, a theory which the jury apparently rejected at least with regard to five of the seven counts. See 485 F.2d at 1220-1223.

Although both DeStefano and Lamattina had pleaded guilty prior to the commencement of the trial,[5/] neither was called as a witness. The government's case was based principally on the testimony of Leuci, and on the tape recordings which he made of several conversations between himself and the defendants. The other government witnesses were Assistant United States Attorneys and surveillance agents, whose testimony was clearly ancillary and introduced for corroboration of Leuci. All sides were aware, prior to and during the trial, that Leuci's credibility was a matter of no small significance. The defense therefore made a concerted effort, beginning with its pretrial motions, to locate information damaging to Leuci.[6/] In an effort to minimize the impact of such information, the government prosecutors elicited from Leuci at the very outset of his trial testimony admissions of prior criminal conduct. He testified to four such acts: on four occasions between 1966 and 1968, he had acted as an intermediary between detectives in the Narcotics Division and those under investigation by that division.

Actually, he arranged to sell the information gathered by other detectives to those being investigated, and in the four incidents he described he had accumulated approximately $6,000. Leuci maintained under persistent cross examination by Rosner's trial counsel that these were the only criminal acts in which he had ever participated.

I.

On April 17, 1974, as I have already noted, Leuci made what he now claims is a full disclosure of his prior wrongdoing. The crimes to which he has now confessed are numerous and go far beyond his admissions at the Rosner trial. A brief enumeration follows, if only to establish a proper order of magnitude. On approximately fifteen occasions, Leuci shared with fellow police officers money seized in narcotics raids. Over a period of perhaps three years, he distributed small quantities of heroin to informants. He also took money, and occasionally, heroin, from informants in exchange for letting them continue to sell narcotics. He sold information that had been gleaned from police investigations and acted as an intermediary for other policemen who wished to [illegible] sales.[7] He participated in illegal electronic surveillance [illegible] ral occasions. He accepted sums of money from lawyers [illegible] one occasion, participated in the paying of a bribe to an [illegible]stant District Attorney. He made payments of money to his [illegible]perior officers in the Police Department. And finally, it is almost supererogatory to add that he committed perjury at the Rosner trial, at a trial in the New York state courts, and in numerous interviews with government prosecutors and defense lawyers.[8]

Rosner's new trial motion, however, is not premised merely on Leuci's perjury. He points to various incidents which, he claims, demonstrate either that government prosecutors were aware of Leuci's perjury regarding his past crimes or that they withheld evidence of such crimes from the defense prior to and after the trial. I shall recount each of these very briefly.

The first act of alleged suppression took place in 1971, before Leuci began working with the United States Attorney's office here. Leuci had been with the Knapp Commission, where he developed a rapport with one of the Commission's lawyers, Nicholas Scoppetta.[9/] In March of that year Scoppetta ordered Leuci to investigate the involvement of Richard Lawrence, previously identified as an informant of Leuci's, in a homicide in the Bronx. As a result Leuci tape recorded a conversation with Lawrence. The conversation yielded no information about the homicide; it did suggest, however, that both Leuci and Lawrence had participated in illegal seizures of narcotics following arrests, and that Lawrence had retained some of the narcotics ("packages") to help meet a continued need for money. The conversation, whose most significant passage is set out in the margin[10/] is neither as unequivocally inculpatory as Rosner claims nor as exculpatory as the government argues. There is no question, however, but that during the course of it Leuci demonstrates a familiarity with procedures whereby Lawrence would obtain "packages" of heroin resulting from arrests. Leuci told Scoppetta of this conversation and Scoppetta subsequently listened to the tape, which he took with him when he joined the staff of

the United States Attorney. The tape was, however, not disclosed to the defense prior to the trial, and only came to light during the final days of the instant hearing, when Leuci made an inadvertent reference to it.

Rosner alleges one other instance of governmental suppression. On July 13, 1972 Leuci was interviewed in the offices of the United States Attorney by two agents of the Drug Enforcement Administration (DEA), Robert Goe and Joseph Gately. He admitted to them that in 1964 or 1965 he had participated in a warrantless search for drugs along with three other government agents. No narcotics were found, but the four men did steal $200 from the premises which they divided among themselves equally. This was dutifully memorialized in what has come to be known as the "Goe memorandum". Leuci had made a similar admission in early 1971 to another DEA agent, Andrew Tartaglino, at the apartment of Edward M. Shaw, then an Assistant United States Attorney. Shaw learned of the incident shortly thereafter. The Goe memorandum, which the government concedes to have been "3500 material"[11/], was not turned over to the defense prior to trial. None of the government prosecutors who participated in the Rosner trial was aware of it until April 9, 1974, when Elliot Sagor, one of the prosecutors, learned of it.

Rosner presents four separate arguments concerning alleged governmental misconduct prior to and during the trial. (Two other arguments, claiming post trial suppression, will be considered in later sections of this opinion.) First, he argues that Leuci's

perjury, in and of itself, was so extensive, and presented such a distorted picture of the man to the jury, that a new trial is required. Second, he argues that Leuci's status as a government agent and as an integral part of the prosecution require that his own awareness of his perjury be attributable to the government, and that the case be viewed as if there were governmental knowledge of the perjury. Third, he argues that governmental knowledge of perjury is further established by Shaw's awareness of the Goe memorandum and Scoppetta's familiarity with the Leuci-Lawrence taped conversation. The fourth argument is in effect a restatement of the third: it is contended that Shaw and Scoppetta suppressed evidence of Leuci's crime in the Goe and Lawrence incidents, and therefore materially impeded the preparation of the defense.

Before considering each of these arguments in turn, it will be useful to review the various standards that have been applied in evaluating motions for a new trial based on newly discovered evidence. The general standard is now a familiar one: "the evidence must have been discovered after trial, must be material to the factual issues at the trial and not merely cumulative and impeaching, and of such a character that it would probably produce a different verdict in the event of a retrial." United States v. Kahn, 472 F.2d 272 (2nd Cir. 1973); United States v. DeSapio, 456 F.2d 644 (2nd Cir. 1972); United States v. Polisi, 416 F.2d 573 (2nd Cir. 1969).

Where the evidence newly discovered demonstrates perjury by a prosecution witness, the standard is, in some respects,

altered. A distinction, however, must be drawn between perjury known to the government and perjury of which the government was unaware. If the government was unaware of the perjury, the applicable standard is the traditional one just enunciated. Although United States v. Polisi, supra, suggests a more liberal standard, I think Judge Weinfeld is surely correct in concluding that a relaxation of the traditional newly discovered evidence test is justified only where government knowledge of the perjury can be established. United States v. Marquez, 363 F.Supp. 802 (S.D.N.Y. 1973), aff'd on opinion below, 490 F.2d 1383 (2nd Cir. 1974). Where such knowledge is established, the test is relaxed in two respects. First, the newly discovered evidence need not be material to guilt or innocence alone; it may pertain solely to the credibility of a witness. Napue v. Illinois, 360 U.S. 264 (1959); Giglio v. United States, 405 U.S. 150 (1972). Second, the defendant need establish only that the newly discovered evidence might have produced a different verdict. United States v. Marquez, supra; Giglio v. United States, supra; Kyle v. United States, 297 F.2d 507 (2nd Cir. 1961; Larrison v. United States, 24 F.2d 82 (7th Cir. 1928).

Yet a different set of standards is applicable when it is determined that the newly discovered evidence was suppressed by the prosecution. Those standards were first articulated by Judge Friendly in United States v. Keogh, 391 F.2d 138 (2nd Cir. 1968), and reaffirmed in United States v. Kahn, supra. In such a case of intentional suppression, a new trial is warranted if the evidence is merely ~~material or~~ favorable to the defense. The same standard

applies even in the absence of intentional suppression, "if it appears that the high value of the undisclosed evidence could not have escaped the prosecutor's attention." The Kahn court notes that materiality is defined "by the effect of its suppression upon preparation for trial, rather than its predicted effect on the jury's verdict."12/ The defendant has a heavier burden where the evidence was inadvertently suppressed, and where its value is not so readily apparent. Under such circumstances, the defendant need not show the probability of a different verdict upon retrial, but must demonstrate that there is "a significant chance that this added item, developed by skilled counsel ... could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." United States v. Miller, 411 F.2d 825 (2nd Cir. 1969); United States v. Mayersohn, 452 F.2d 521 (2nd Cir. 1971); United States v. Kahn, supra.

II.

I shall first consider defendant's allegations of governmental suppression of the evidence in the Goe memorandum and of the Leuci-Lawrence tape. I should note preliminarily that the defendant is surely correct in arguing that the acts in question are attributable to the government. The fact that neither Scoppetta nor Shaw directly participated in the Rosner trial is immaterial; it is now settled law that the misdeeds of one member of a prosecutor's office are attributable to the prosecution as a whole. Giglio v. United States, supra; Santobello v. New York, 404 U.S. 257 (1971); United States ex rel. Rice v. Vincent, 491 F.2d 1326 (2nd Cir. 1974). But my finding need not be based on this abstract proposition alone,

for I must also conclude that both Shaw and Scoppetta were deeply involved in the preparation of the Rosner case. The two men were given primary responsibility for gathering and disclosing to the defense all "3500 material". Shaw also presented the case to the grand jury and, although by the time of trial he had left the United States Attorney's Office to become head of the Southern District's Strike Force, he was the government's first witness and by his own admission followed the trial closely.

A. Using the Kahn test, I shall attempt to evaluate the government's actions with regard to the Goe memorandum and the Leuci-Lawrence tape separately. Taking the Goe memorandum first, I find that Shaw's actions fall far short of the first of the Kahn categories: there was certainly no deliberate and carefully considered decision to suppress the information, and I do not understand even the defendant so to contend. The next inquiry, then, is whether the evidence was of such "high value" that it "could not have escaped the prosecutor's attention". Quite the opposite appears to me to be the case. It describes, in essence, the participation by Leuci in an illegal entry and a $50 theft, crimes which pale in significance as against those to which he testified at trial. It will be recalled that Leuci admitted participation in shakedowns of narcotics suspects which earned him thousands of dollars. The government prosecutors thus knew, long before the Rosner trial, that Leuci's record was marred by serious criminal activities. The $50 incident described in the Goe memorandum was thus not likely to stand out in anyone's mind as an egregious example

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of wrongdoing that undermined firmly held assumptions about Leuci's probity. Had this incident been the only blot in an otherwise immaculate record, then I could well find that its value was such that it could not have escaped a diligent prosecutor's attention.

The defendant, however, argues that the Goe memorandum has a far greater significance than I have suggested. The crime described therein, he argues, was wholly different from those to which Leuci confessed at the trial. As he puts it, "The four incidents in which Leuci was an intermediary in information sales were at most victimless crimes in which Leuci's participation was beneficial to all parties. In sharp contrast, the Goe crime involved a victim whose home was burglarized and who lost $200 to the thieves in government uniforms, gaining nothing in return."[13/] (Emphasis in original). The argument is staggeringly disingenuous.[14/] My task here, however, is not to weigh the stigma attaching to various classes of felonies but to determine whether the incident described in the Goe memorandum was of such significance that it should have attracted the attention of any conscientious prosecutor. Seen against the background of those other crimes to which Leuci

has confessed, it had no real significance and was, as I stated at the hearing, de minimis.

Having found the suppression to be inadvertent, and having found the evidence to be of no conspicuous value, I thus reach the third element of the Kahn test: was there a "significant chance that this added item, developed by skilled counsel ... could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction."? I think not, and my reasons for so concluding go directly to the basic weakness of each of Rosner's proffered arguments. The unstated premise of this motion, in all its facets, is that if the Rosner jury had known of Leuci's other criminal activities, whether the Goe incident, the Lawrence conversation, or even the entire panoply of his crimes, his credibility would have been so severely undermined that a different verdict would have been inevitable. I cannot share this view of the evidence or of the jury's perspicacity. The trial was not a simple matching of Leuci's credibility against Rosner's; had it been, the arguments the defendant now advances would have infinitely greater persuasive force. The government's case was based on Leuci's testimony, as corroborated by several tape recordings of conversations in which Leuci and Rosner, among others, participated. Leuci was not the lynchpin of the government's case; the tapes were. Nothing demonstrates this more forcefully than the verdict itself. The two acts of bribery of which Rosner was acquitted took place on days when Leuci wore no transmitting device; the three acts of bribery of which he was convicted took place while conversations were recorded. Although jury verdicts are rarely unambiguous, the inference is

inescapable that the jury attached great weight to the existence of tape recordings. The verdict also makes clear that Leuci's credibility did not simply carry the day for the prosecution, as the defendant would now have us believe.

Further corroboration of Leuci's account, furthermore, was provided by the testimony of the defendant himself. In the course of establishing his entrapment defense Rosner admitted virtually all of the elements of the various crimes charged. He admitted evincing interest in the grand jury minutes and "3500 material", and he admitted making payments for them. I therefore find that no matter how much Leuci's credibility could have been undermined, whether by a single additional incident or the full range of his crimes, the jury's verdict could not possibly have been affected. It follows that the incident described in the Coe memorandum, no matter how eloquently presented to the Rosner jury, could not have, in the words of the Kahn test "induced a reasonable doubt in the minds of enough jurors to avoid a conviction."

B. Turning to the Leuci-Lawrence tape, I again find no evidence of deliberate, considered suppression. Scoppetta stated, in testimony I find wholly credible, that when he heard the tape his principle concern was the homicide that he had asked Leuci to investigate. Because the conversation was quite uninformative on that point, he paid it little attention thereafter. Although the tape remained in a locked cabinet in the United States Attorney's Office, there is nothing before me that suggests that the tape was withheld prior to trial because of its references to narcotics

transactions involving Leuci.

The question of whether the tape had such value as to arrest the attention of a conscientious prosecutor is slightly closer. It would be close indeed if the conversation it contains establishes Leuci's criminality as authoritatively as Rosner argues. It is, however, a peculiar and ambiguous document. The passage set out at footnote 10, supra, can be read in various ways. Leuci's question to Lawrence, "Have we ever made a case where you didn't get a piece of the package?" suggests that he participated in narcotics arrests in which Lawrence was permitted to keep a portion of the drugs. Lawrence's incredulous response to this question, "Hell, we've made a whole lot of cases that I didn't get a piece of the package", is open to two interpretations. It may suggest, as the government urges, that Lawrence never took drugs while Leuci was making an arrest. It may also suggest that on many occasions Lawrence obtained no drugs, but on others he did. We now know from Leuci's testimony at the instant hearing that on two occasions he permitted Lawrence to take drugs in the course of an arrest. But even a diligent prosecutor reviewing the conversation could reasonably conclude that the conversation shows no more than a streetwise policeman's familiarity with the manner in which narcotics informants obtain drugs. The tape, in short, does not shriek of Leuci's criminality, and its dubious value could readily have escaped a prosecutor's attention.

Because of the conversation's ambiguity, I would also not be warranted in concluding that it could have induced a reasonable

doubt sufficient to avoid conviction, no matter how skillfully exploited by Rosner's lawyers. Standing alone, its probative force is minimal. Even if, as defendant argues, the pretrial disclosure of the tape would have led to Lawrence, and thence to the two incidents Leuci has now admitted, the effect on the jury would have been insignificant. As the Judge who presided over the trial and carefully observed its course and conduct, I do not believe that a diminution in Leuci's credibility would have been fatal to the government's case. I am therefore compelled to reject that branch of defendant's motion based on alleged suppression of evidence by the prosecution.

III.

Closely related to the discussion in the preceding section is defendant's contention that a new trial is mandated by the prosecution's knowledge of Leuci's perjury. The essence of this argument is that while Leuci was denying all criminal acts save the four to which he testified, Shaw was aware of the incident described in the Goe memorandum and Scoppetta of the implications of the Leuci-Lawrence tape. As I indicated at the outset of the preceding section, Shaw and Scoppetta's knowledge must be attributed to the prosecution. Giglio v. United States, supra; Santobello v. New York, supra.

On this branch of the motion, it is well to remember that the prosecution can be held responsible for knowledge only of the Goe memorandum and the Lawrence tape. With regard to the latter, I shall simply assume arguendo that an awareness of this conversation bespeaks a knowledge of Leuci's narcotics dealings with

however, in actuality, a prosecutor fully aware of this conversation could reasonably have seen no inconsistency between it and Leuci's trial testimony. The question then comes down to this: is the government's awareness of Leuci's failure to acknowledge these few criminal acts sufficient to warrant a new trial? I think not. The applicable standard has already been set forth: might this evidence, newly revealed, have led to a different verdict? We have been cautioned by the Supreme Court in Giglio that a new trial is not required whenever "a combing of the prosecutor's files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict." See United States v. Keogh, supra. "A new trial is required if 'the false testimony could ... in any reasonable likelihood have affected the judgment of the jury.'" (Citing Napue v. Illinois, supra.) As I have already stated in considering Rosner's suppression argument, there is not the slightest likelihood that the jury, having been apprised of the Goe incident and the transactions with Lawrence, would have reached a different verdict. This branch of the motion is denied as well.

IV.

I turn now to that aspect of Rosner's argument that focuses not on the knowledge of the prosecutors, but on Leuci's own awareness of his perjury. The United States Attorney's Office, as I have noted, can only be charged with the awareness of those incidents which are the subject of the Goe memorandum and the Lawrence tape; Leuci, of course, was the only one who knew exactly how flagrant his perjury was.

A. There is no need to dwell at length on defendant's argument that the "massive" nature of Leuci's perjury, in and of itself, requires a new trial. It reflects a misunderstanding of the applicable law governing new trial motions. I have previously noted my agreement with Judge Weinfeld's conclusion in United States v. Marquez, supra, that the more relaxed standard governing new trial motions alleging perjury applies only where governmental knowledge of the perjury can be established. 363 F.Supp. at 805-6. Hence the appropriate test to be applied is that which governs new trial motions in general, and the second element of that test is that the evidence be material to the factual issues at the trial and not merely cumulative and impeaching. United States v. Kahn, supra. The evidence newly discovered here, regardless of its extent, only serves to impeach Leuci's credibility. It does not address the question of defendant's guilt or innocence. It cannot therefore furnish a basis for a new trial motion. I see no justification here for departing from the rule that a witness's perjury regarding collateral matters cannot, by itself, warrant a new trial. 15/

B. The defendant, however, proffers an alternative theory based on Leuci's perjury. He invokes a line of authority commencing with Pyle v. Kansas, 317 U.S. 213 (1942), that holds the government answerable for perjurious testimony given or induced by police officers even without the knowledge of government prosecutors. As Judge Sobeloff stated in Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964), "[t]he police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney were guilty of the nondisclosure." See also, Curran v.

State of Delaware, 259 F.2d 707 (3rd Cir. 1958), cert. denied, 358 U.S. 948 (1959); Smith v. State of Florida, 410 F.2d 1349 (5th Cir. 1969); Fiddler v. Craven, 298 F.Supp. 795 (C.D. Cal. 1969). Posner therefore argues that Leuci was such an integral part of the prosecution team that the whole of his perjury must be chargeable to the government. The government can thus be deemed to have wilfully and knowingly suppressed not merely a few random incidents but the entirety of his criminal past. Under the more lenient standard for new trial motions based on government knowledge of perjury, he argues, a new trial is required.

I do not for a moment quarrel with the principle announced in Pyle, Barbee, and the other cases cited, but I do not consider it to be fully applicable here. Leuci was of course a part of the prosecution team in that although a New York City policeman, he was working full time under the supervision of the United States Attorney's Office. But he was not a "part of the prosecution" in quite the same sense that the officers in, for example, Pyle, Curran, or Barbee were. The policemen in those cases actively engaged in investigating and preparing the cases in question for trial; their functions were ancillary to, and supportive of, the prosecutors. Leuci's role here differs significantly. His status as a policeman was incidental; he functioned not as a policeman but as an undercover agent whose utility to the prosecution was enhanced because his pose as a corrupt policeman made the role he had to play more credible. He did not, obviously, participate in the investigation of this case or in its preparation for trial except insofar as he was a witness to the events in question.

I point out these differences only to stress that the perjury or falsification in which the police engaged in Curran, Barbee, etc. was committed in the course of performing prosecutorial functions. In Curran policemen destroyed statements given them by defendants which, if offered in evidence, would have substantiated one of their defenses. In Barbee the police suppressed ballistics reports which tended to show that defendant's weapon was not used to commit the crime of which he was charged. In so doing these policemen abused their prosecutorial function. Leuci's perjury, on the other hand, was not committed in the course of his functioning as a prosecutor; he lied about his criminal past just as any other witness similarly situated might have.

There is another point of distinction between the instant situation and the cases on which Rosner relies. In the latter, the perjury or suppression committed by police officers concerned issues relating to the ultimate question of guilt or innocence. Leuci's perjury, as I have now repeatedly noted, went only to the issue of his own credibility. There is no sound policy reason, I submit, to extend the principle of these cases to acts of perjury committed by policemen which affect only their own credibility. To hold the government answerable for the suppression of evidence by its subordinates serves a salutary deterrent function; it requires all those who participate in a prosecution to sift through the evidence with greater care and to supervise the work of their subordinates with greater vigilance. It is difficult to see what deterrent function is served by holding the government answerable for perjury on such collateral matters: no degree of supervision

by a prosecutor is likely to protect a policeman from lying about his criminal activities, but close supervision is likely to prevent the falsification or suppression of other evidence. I therefore decline to attribute Leuci's knowledge of his perjury to the government here, or to extend the Pyle principle in the fashion defendant now urges.

There is an alternative basis for my ruling. Even if Leuci's perjury is fully attributable to the government, and even if the proper test for analyzing its effect was whether the jury might have reached a different result, I would be compelled to deny this branch of the motion. I adhere to my conclusion, set forth in Part II of this opinion, that Leuci's credibility was not the crux of the government's case. The jury had before it the very best evidence of Rosner's criminality — the record of his own voice and words and their intonation made in the midst of his criminal activities. Thus, even had the jury been fully apprised of Leuci's criminal background and his credibility diminished accordingly, I see no reasonable likelihood of a different jury verdict. For the tape recordings spoke far more decisively of Rosner's guilt than Leuci did.

V.

The foregoing discussion disposes of defendant's various claims of pretrial suppression and perjury. I now turn to his charges of post-trial suppression. The first of these alleged acts of suppression took place in January, 1973, a month after the trial had concluded. In late December, 1972, Lawrence went to the office

of Frank Rogers, the Special Assistant District Attorney in charge of narcotics prosecutions in New York City and informed him that he had often been given narcotics by Leuci. Rogers communicated this information to the United States Attorney's Office. Robert Morvillo, then head of the Criminal Division and the government's chief trial lawyer in the Rosner case commenced an investigation of those charges on or about January 2, 1973. The investigation was entrusted to Charles Sherman, an agent with the Drug Enforcement Administration. Sherman and a subordinate interviewed Lawrence and were told of the many narcotics transactions in which he claimed to have participated with Leuci. Lawrence mentioned various individuals who were also party to these transactions: one named John, another named Robert, another named "Saint". Lawrence did not know the full names, addresses, or telephone numbers of any of these individuals, and DEA agents were unable to locate any of them in the ensuing weeks with the information he did provide. Lawrence was also given a lie detector test which, according to the concern which administered it, he failed. Morvillo was told of the results of the test on January 18, 1973 and decided to abandon any further investigation into Lawrence's allegations during the week of January 21.

While this investigation was underway, Rosner filed his first new trial motion, which was based on the affidavits of several narcotics addicts alleging that Leuci had sold them drugs. The motion was filed on January 12 and a hearing was held on January 26, after which I denied the motion from the bench. At no time during the pendency of this motion did the government

inform Rosner of Lawrence's allegations.

Rosner now argues that the government was obligated to disclose Lawrence's allegations to him. He contends further that the government's supposed investigation of the charges was inadequate, and that had greater pains been taken Lawrence's allegations could have been substantiated. He also introduced several experts who testified that Lawrence's polygraph test was at worst inconclusive and could by no means have been adjudged a failure. All of these derelictions, he argues, are sufficiently serious as to justify a new trial.

In considering this contention I do not find it necessary to pass on the adequacy of the government's investigation of Lawrence's allegations. I shall note, however, that an experienced prosecutor is entitled to view with some skepticism the information provided by a long time narcotics informant. On the other hand, the prosecutors could not help but recognize the similarity between Lawrence's charges and those contained in the affidavits submitted in support of Rosner's motion; they should thus have realized that the information supplied by Lawrence might have been of some assistance to Rosner in substantiating the contentions advanced in the motion.

But even so, I fail to see how it could avail Rosner. The simple fact is that he was in no way prejudiced. All that resulted was the denial of a new trial motion; Rosner has now had another

opportunity to move for a new trial, and to include in such motion all of the charges of what the government failed to apprise him in January, 1973.[16/] The absence of prejudice can best be demonstrated by comparing a motion based on post-trial suppression to one based on pre-trial suppression. In the latter circumstance, the court inquires into the effect of such suppressed evidence on the jury's verdict. If the court deems the effect sufficiently substantial, a new trial is ordered. Where post-trial suppression is alleged however, the court's proper inquiry is into the effect of the disclosures on any new trial motion that has been made. Thus the most Posner would be entitled to on this branch of the motion is a finding that my decision on his first new trial motion might have been affected by the new evidence, and my affording him another opportunity to move for a new trial. In the hearing on his most recent motion, he has been given that opportunity. (I have of course dealt elsewhere in this opinion with the Leuci-Lawrence drug transactions, and have found them insufficient to warrant the granting of a new trial.)

I should note in concluding this branch of my discussion that the defendant's failure to call Lawrence to testify scarcely bespeaks unbounded confidence in the quality of his testimony. It also tends to undermine the defense contention that Lawrence's information was of such singular value that the government prosecutors should have investigated it more thoroughly. Finding no prejudice to the defendant in any suppression of such information, I am constrained to deny this aspect of his motion.

VI.

Rosner's other claim of post-trial suppression concerns the Goe memorandum, whose contents have already been discussed. As I have noted, it appears that Shaw was the only government prosecutor aware of the Goe memorandum during the Rosner trial. On or about April 8, 1974, the memorandum came to the attention of Elliot Sagor, an Assistant United States Attorney who has been involved with the Rosner case from its very inception. At this time, of course, Rosner's petition for certiorari was pending in the Supreme Court and the instant new trial motion had been filed in this court. Upon reading the document Sagor realized "that the Goe memorandum, if true, and if in government possession and known to the government at the time, was a document which should have been turned over to defense counsel at the time of trial."[17/] Shortly thereafter, on April 17, 1974, Leuci admitted to government prosecutors the full range of his past criminal activities. There then commenced consultations among various members of the United States Attorney's Office regarding when and whether the Supreme Court should be apprised of these revelations.

On April 30, 1974 John D. Gordan III, the Assistant United States Attorney in charge of appeals, called Andrew Frey of the Solicitor General's office and informed him of the nature of Leuci's perjury at the Rosner trial. The Solicitor General then wrote to the Clerk of the Supreme Court requesting that consideration of the Rosner certiorari petition be postponed until a supplemental brief could be filed. Members of the United States Attorney's

Office reviewed a draft of the brief before the Solicitor General submitted it in mid-May. The brief stated that "recent developments suggest that the principal government witness committed perjury at the trial of this case as to collateral matter raised by the defence in an effort to impeach his credibility", but did not review in detail Leuci's recent admissions of criminal conduct.

The essence of Rosner's argument on this point is that the United States Attorney's Office withheld from the Solicitor General and thereby from the Supreme Court any mention of the Goe memorandum. This suppression, he contends, was considered and deliberate, and now warrants the granting of the relief sought from the Supreme Court: a new trial.

Again, however, I see no prejudice to Rosner from the government's omission. The incident described in the Goe memorandum was trivial in comparison to the other crimes to which Leuci confessed. His overall confession was brought to the attention of the Supreme Court, and I therefore fail to see how the addition of a single minor item to the list of Leuci's sins could have produced a different result in that Court. Whether I am right or wrong in this conclusion is beside the point, for the Court may well have another opportunity to pass on Rosner's contentions. And therein lies the weakness of his argument. The Supreme Court denied the petition for certiorari without prejudice to this court's consideration of the instant motion. By implication, then, the Court deferred consideration of all claims arising from this motion. Rosner has since had the fullest opportunity to explore in this

court the significance of the Goe memorandum, and he will have equal opportunity to present it on appeal. I therefore find no prejudice to him in the government's decision to withhold the Goe memorandum, and this branch of his motion is also denied.[18/]

Conclusion

For the reasons stated above, Rosner's motion for a new trial is denied in all respects.[19/] It is proper to add in concluding a word regarding the nature of the arguments presented here. The spectacular quality of Leuci's revelations of criminal conduct has at times obscured its minimal relevance to the issues before me. None of Leuci's perjury has the slightest bearing on the question of Rosner's guilt or innocence of the charges contained in the instant indictment. His perjury, nevertheless, would be a matter of serious concern if his credibility had been crucial to the jury's determinations. As I have now noted several times, it was not. The tape recordings and, indeed, the admissions contained in Rosner's direct testimony at trial were the conclusive evidence upon which his conviction was based. Leuci's crimes, reprehensible as they are, cannot alter that fact. The motion is denied.

IT IS SO ORDERED.

Dated: August 15, 1974

Arnold Bauman
U. S. D. J.

Footnotes

1/ One count alleging removal of government documents was dismissed prior to trial, United States v. Rosner, 352 F.Supp. 915 (S.D.N.Y. 1972), and the jury acquitted Rosner on two counts of bribery.

2/ As shall appear more fully below, the usage is ironic.

3/ For other consequences of Leuci's revelations, see Special Prosecutor of the State of New York v. United States Attorney, 375 F.Supp. 797 (S.D.N.Y. 1974).

4/ The indictment was ultimately dismissed. See United States v. DiStefano, 464 F.2d 845 (2nd Cir. 1972).

5/ DeStefano's plea was entered after the jury was selected but prior to the presentation of evidence.

6/ For example, on July 21, 1972 the defense filed motions for discovery in which they sought disclosure of all matters contained in New York City Police Department files concerning complaints of misconduct, investigations, or disciplinary proceedings against Leuci.

[* 7/ He has now confessed to acting in this intermediary role on occasions other than those about which he testified at the Rosner trial.

8/ I have avoided estimating the financial gains derived from any of these activities, for Leuci's recollection was poor in this respect, but there can be little doubt that he realized at the very least tens of thousands of dollars.

9/ Scoppetta went from the Knapp Commission to the United States Attorney's Office in mid 1971 and, it appears, took Leuci with him.

10/

"Leuci: You know, the story with you is always the same story. Now, let me explain something. The easiest way for you ~~to get a package is~~ to make a case, right?

Lawrence: Make a case?

Leuci: Yeah. Am I right or wrong?

Lawrence: No, no, no. How the hell am I gonna ... here the hell is that gonna work?

Leuci: Oh, come on. What are you talkin' about?

Lawrence: What do you mean so ... so ... what do you ... what do you mean? How the hell is ... how is that gonna work?

Leuci: If you make a case.

Lawrence: Yeah.

Leuci: And there's a seizure.

Lawrence: Yeah.

Leuci: You get a piece of the package, right?

Lawrence: No. Not necessarily. How ... how do you figure that?

Leuci: Have we ever made a case where you didn't get a piece of the package?

Lawrence: Have we ever made a case that I didn't get a piece of the package? Oh, man, I don't know what the Hell you talkin' about. I don't know what you talkin' about. Have we ever made a case that I didn't get a piece of the pack ...? Hell, we've made a whole lot of cases that I didn't get a piece of the package. I don't know what the hell you talkin' about. Shit! That ... that ... that ... if that was the case, I'd 've been straight now. But ... have we made a case and I get a piece of the package ...

Leuci: No. I'm not talkin' ... you know

Lawrence: I'd be sittin' on the top of the world.

Leuci: Yeah, right. But we really never made, you know, like when we were fallin' over fuckin' packages.

Lawrence: Right.

Leuci: You know, I agree with you there.

Lawrence: Right.

Leuci: But, I ... I would think that the easiest way to go up and you know, you make it

understood before you make the case. Look, I'm gonna make this case. We're gonna do something. Whoever you've workin' with. With whoever you've workin' with. So it takes you four days to make ... whatever bullshit case ... like you to get a guy with a eighth half, whatever.

Leuci: It is. (1 secs/unintell.) and you get your hands on something ... three owners, four owners, and you're home free. Right

Lawrence: No man. You can't do things like that.

Leuci: Don't you tell me you can't do things like that.

Lawrence: You can't do things like that.

Leuci: Well. I don't know."

11/ Government's Post-Hearing Memorandum of Law, p. 25.

12/ This standard of materiality thus contrasts with that applicable in cases of governmental knowledge of perjury, where the focus of the court's inquiry is the effect on the jury, not on defense preparation.

13/ Defendant's Memorandum of Law, pp. 20-21.

14/ The argument takes the notion of "victimless crimes", a term developed by criminologists to define a class of activities, such as homosexuality or the distribution of pornography, defined as criminal largely because of prevailing moral standards, and extends it to any crime in which, presumably, there is no complaining witness. By this logic, tax evasion, perjury, bribery or obstruction of justice are all victimless crimes and, one supposes, less offensive to the sensibilities of juries than assault and battery.

15/ In support of a contrary view Rosner cites United States v. Gordon, 246 F.Supp. 522 (D.D.C. 1965). It was there discovered that the government's complaining witness had been convicted of larceny after denying so at the trial. In considering a new trial motion the district court acknowledged the ordinary rule that newly discovered evidence affecting a witness's credibility will not warrant a new trial. The court felt compelled to depart from the rule, however, and granted the motion. The case is readily distinguishable: the court noted that the new impeaching evidence was

of a "very serious nature under the circumstances of this case, there being no corroboration and no eye witnesses." Here, of course, Leuci's testimony was thoroughly corroborated by the tape recordings as well as Rosner's own testimony at trial; the verdict thus cannot be said to have hinged on his credibility, as the court concluded it did in Gordon.

16/
It should be noted also that Rosner has remained free on bail pending appeal since the jury's verdict in December, 1972.

17/
Hearing transcript, p. 593.

18/
In arguments presented to this court Rosner has repeatedly stressed the parallels between the instant situation and that facing the Supreme Court in Mesarosh v. United States, 352 U.S. 1 (1956). As I understand it, he argues that if he had been able to present the incident described in the Gee memorandum to the Court, it would have sua sponte ordered a new trial as it did in Mesarosh. This argument cannot withstand serious scrutiny.

In Mesarosh, a Smith Act prosecution, the Solicitor General stated to the Court his belief that the principal government witness had committed perjury in other proceedings. In these proceedings he had made offensive accusations of Communist activity similar to those he had made against the defendant in Mesarosh. The Solicitor General maintained that the witness's trial testimony was truthful, but moved to remand the case for a hearing into the extent of his perjury. The Court instead ordered a new trial.

Rosner suggests that the Court might have followed a similar procedure here. This argument overlooks the Court's concession that newly discovered evidence that merely impeaches the credibility of a government witness is not an adequate basis for a new trial motion. 352 U.S. at 9. Underlying the Court's opinion in Mesarosh is the assumption that the witness, having falsely accused others, may well have falsely accused the defendant. Hence the witness's perjury was material to the ultimate question of guilt or innocence. It is not in the instant action.

19/
On August 6, 1974 Rosner's counsel informed this court, by letter, of his intention to "interview those jurors who are willing to be questioned as to whether the recent Leuci disclosures would have affected their decision". In response thereto, the government sought an order enjoining a post-trial inquiry of the jury and Rosner agreed that no interviews would be conducted pending this court's determination as to the propriety thereof. In view of my final disposition of the new trial motion I now consider the issue to be moot and accordingly, decline to rule on the government's request.

Rosner has, in no way, been prejudiced by his inability to interview the discharged jurors. While a new trial motion clearly turns on the effect of newly discovered evidence on the jury's decision, "the question is to be determined ... on its probable effect on a hypothetical average jury". United States v. Crosby, 294 F.2d 928 (2nd Cir. 1961). [Emphasis added].

If in fact Rosner is proposing a hearing at which his trial jurors would testify as to what they "would" or "might" have done two years earlier had they known about Leuci's activities he proposes a procedure that can have no useful result. It is, it seems to me, another imaginative effort to frustrate the purpose of all trials — to find the truth.

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